# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1901.**

No. 110.

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WILLIAM H. BRAINARD, EDWARD ALBERT BRAINARD, AND EVA HANMORE, APPELLANTS,

*vs.*

LEFFERT L. BUCK AND JAMES COLEMAN.

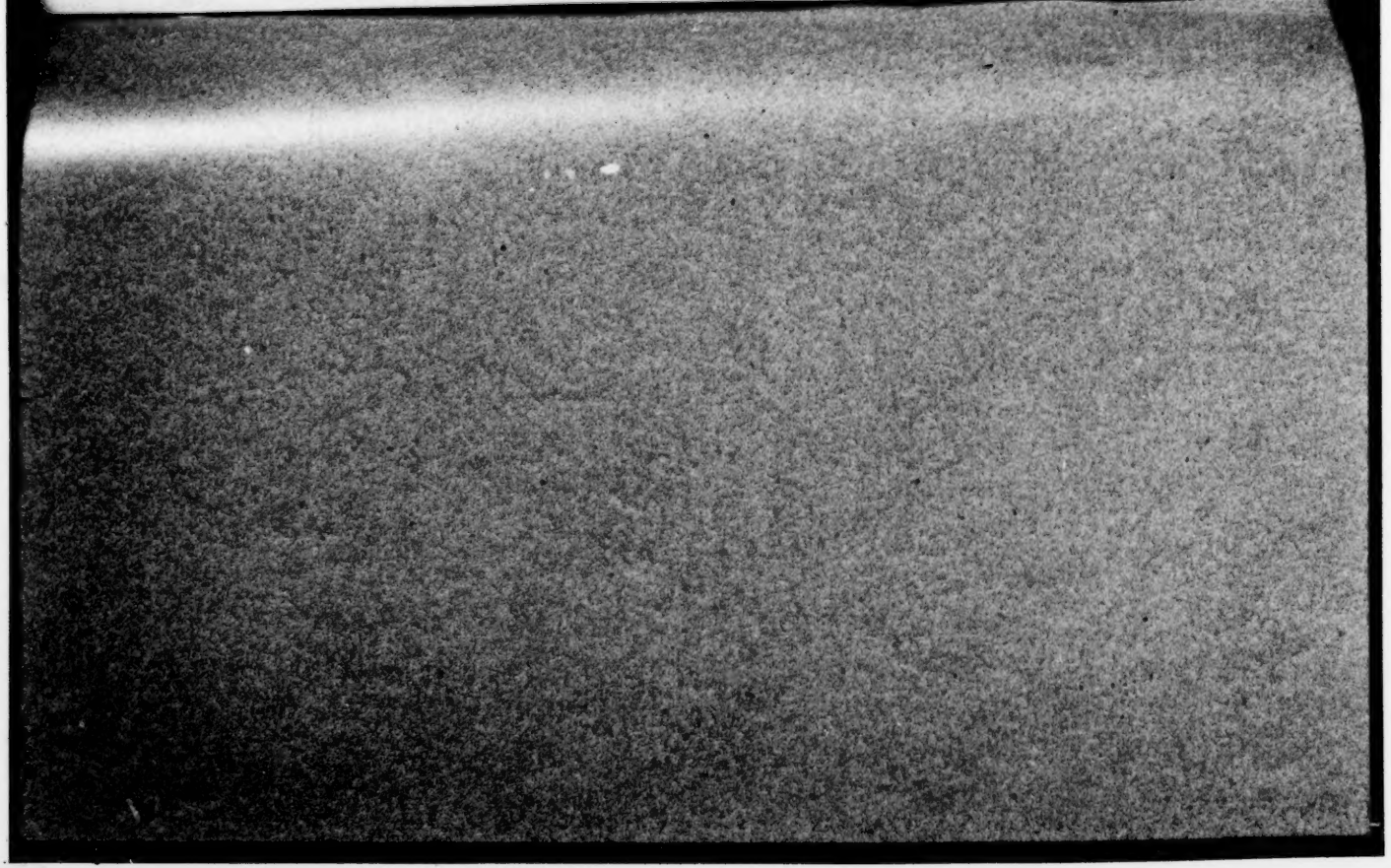
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APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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**FILED JULY 19, 1900.**

**(17,837.)**



# (17,837.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 14, 1901.

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1 In the Court of Appeals of the District of Columbia.

WILLIAM H. BRAINARD ET AL., Appellants,
*vs.*
LEFFERT L. BUCK ET AL. } No. 972.

Supreme Court of the District of Columbia.

LEFFERT L. BUCK ET AL.
*vs.*
WILLIAM H. BRAINARD ET AL. } No. 19275. In Equity.

UNITED STATES OF AMERICA,
*District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

*Bill of Complaint.*

Filed April 15, 1898.

In the Supreme Court of the District of Columbia, April 15th, A. D. 1898.

LEFFERT L. BUCK and JAMES COLEMAN
*vs.*
WILLIAM H. BRAINARD, EDWARD ALBERT Brainard, and Eva Hanmore. } In Equity. No. 19275.

To the supreme court of the District of Columbia, holding an equity court:

Humbly complaining unto your honors, the plaintiffs state as follows:

1. They are citizens of the United States, the plaintiff Leffert L. Buck residing in the city and State of New York, and the plaintiff James Coleman residing in Washington, D. C., and they bring this suit, the plaintiff Leffert L. Buck as having the equitable title to the premises hereinafter described, and the plaintiff James Coleman as being in possession as lessee from said Buck of said premises.

2. The defendants are citizens of the United States and reside, the defendant William H. Brainard at Galesburg, in the State of Illinois, and the defendants Edward Albert Brainard and
2 Eva Hanmore in Alaska, and that they claim to recover the possession of the premises hereinafter described as being the next of kin and heirs-at-law of one Charles F. Brainard, deceased, hereinafter mentioned.

3. That there is a suit pending on the law side of this court, which is the suit of William H. Brainard against James Coleman, No. 41274, and which is brought to recover the possession of a one-third undivided part of that piece or parcel of ground and premises lying and being in the city of Washington, District of Columbia, known on the ground plan or plat of said city as lot numbered sixty-nine (69), in C. H. Lindsley's subdivision of lots in square numbered one hundred and eighty-two (182), and for damages for the unlawful occupation and detention thereof, as will more fully appear by reference thereto and to the papers and proceedings therein on file in the clerk's office of said court.

4. That on the 12th day of June, 1872, one Charles F. Brainard duly made and executed his last will and testament, by which he devised and bequeathed unto his wife, Cornelia A. Brainard, all of his property of every kind and description for her own use and benefit forever, a copy of which said will is hereto annexed, marked Exhibit "A."

5. That thereafter and on the 18th day of July, 1879, there was conveyed to the said Charles F. Brainard by deed the premises hereinafter referred to and described, a copy of which said deed is hereto annexed and marked Exhibit "B."

6. That on the 31st day of March, 1882, the said Cornelia A. Brainard, the wife of the said Charles F. Brainard, by deed duly conveyed the said premises to the plaintiff Leffert L. Buck, a copy of which said deed is hereto annexed, marked Schedule "C."

7. That the said Charles F. Brainard died on the 13th day of May, 1881, and the said Cornelia A. Brainard, his wife, on the 31st day of March, 1892.

8. The plaintiffs further show that the plaintiff Leffert L. Buck was the brother of the said Cornelia A. Brainard, and that her husband, the said Charles F. Brainard, was in his lifetime employed as a clerk in the Treasury Department; that he had little or no means of support outside of the salary which he received, and that the plaintiff Leffert L. Buck, being willing to aid and assist his sister and being solicited by her and her husband so to do, furnished and advanced the money to pay for the said property and premises first above described; that the said premises were purchased with money so advanced by the said plaintiff L. L. Buck, in part directly to the said Brainard to pay for and on account of said property, and in part to the wife of the said Brainard, and in part in taking up and paying encumbrances which had been put upon said property for the purchase price thereof; that said money was so advanced and said property purchased for the sole and only purpose of giving to the said Cornelia A. Brainard, the sister of the said L. L. Buck, a home, and that it was so understood by the said Brainard at the time of said purchase; that the said property was conveyed to the said Brainard instead of to his wife for
3 the reason that prior to said conveyance the said Brainard had executed his will, by which said will he had devised and bequeathed to his said wife all of his property of every kind, and it was understood and believed by the said Brainard and his wife *and*

that if she should survive him the property would descend to her, and that in event she should not survive him, her said husband, she would have a home on said property during her lifetime, and that during said period said Brainard should hold the title to said property as trustee for said plaintiff, Leffert L. Buck.

That after the death of the said Charles F. Brainard the said Cornelia A. Brainard continued to reside on said premises for many years and until her death, and maintained herself in great part by renting the rooms in the house which was upon said premises and by "taking boarders," her husband having left no estate of any value, and was maintained in part by her said brother.

9. That prior to her death and in anticipation thereof and for the purpose of placing the title to said property in the said plaintiff, Leffert L. Buck, who had paid for the same, the said Cornelia A. Brainard, on the 31st day of March, 1882, duly conveyed the said premises by deed to the said plaintiff, Leffert L. Buck, who thereupon, to wit, on the 31st day of March, 1882, duly entered into possession of and has ever since remained in possession of the same.

10. That the said Charles F. Brainard at his death left surviving him, as these plaintiffs are informed and believe, as his next of kin, Frances A. Peck, Caroline B. Farrar, William H. Brainard, Albert Brainard, Edward Albert Brainard, Aaron Brainard, and Mary E. Day; that neither he, the said Charles F. Brainard, nor his next of kin, nor either or any of them, ever paid any money or other valuable thing towards or on account of the purchase of said property; that thereafter and during the year 1888 said Albert Brainard died, leaving him surviving Eva Brainard, his widow, who has since married Thomas W. Hammore, and said Edward Albert Brainard, his son and only child and heir-at-law; that said Aaron Brainard has died, leaving him surviving said Mary E. Day, his daughter and only child and heir-at-law.

11. That since the beginning of said action at law said Frances A. Peck and David B. Peck, her husband; Caroline B. Farrar and Mary E. Day and Alfred Day, her husband, in consideration of the premises, have quitclaimed the said property to the plaintiff Leffert L. Buck.

The plaintiffs further show that since the death of his said sister the plaintiff Leffert L. Buck has been in possession of said premises, and has received the rents and profits thereof, and has believed that the legal title was in him until since the commencement of this suit, when he was advised that the will of the said Charles F. Brainard did not convey the said property to his said sister for the reason that it was acquired by the said Brainard after the execution of said will, and that the will did not operate to convey after-acquired property.

To the end, therefore, that the plaintiffs may have that relief which they can only obtain in a court of equity, and that the
4 said defendants may answer the premises, but not upon oath or affirmation, answer under oath being expressly waived by the plaintiffs, and that the said defendants who are plaintiffs, as aforesaid, in the said action at law, and the said defendants, Edward

Albert Brainard and Eva Hanmore, may be perpetually enjoined from further prosecuting the same, and that it may be declared that the said lands are charged with a trust in favor of and ought to be held for the use and benefit of the said plaintiff, Leffert L. Buck, and that the said defendants, or so many and such of them as shall appear to have the legal title to said lands, may be decreed to convey such legal title, free of all incumbrances done or suffered by them or any or either of them, unto the plaintiffs in their said capacity, to hold to them and their, &c., upon the trusts aforesaid, and for such further or other relief as the nature of this case may require and to your honors seem meet:

May it please, &c., your honors to grant unto the plaintiffs a writ of subpœna, to be directed to the said defendants, William H. Brainard, Edward Albert Brainard (who is an infant under the age of twenty-one years), and Eva Hanmore, thereby commanding them and each of them, at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises; and, further, to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem meet.

L. L. BUCK.
J. COLEMAN.

The defendants are William H. Brainard, Galesburg, Ill.; Edward Albert Brainard, Tyoomick, Cook's inlet, Alaska; Eva Hanmore, Tyoomick, Cook's inlet, Alaska.

JOS. A. BURKART,
*Sol'r for Complainants.*

DISTRICT OF COLUMBIA:

STATE OF NEW YORK, } ss:
*Borough of Manhattan, City of New York,* }

I do solemnly swear that I have read the bill by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

L. L. BUCK.

Subscribed and sworn to before me this fourth day of April, 1898.

NELSON L. ROBINSON,
*Notary Public, N. Y. Co., No.* 41.

JOS. A. BURKART,
*Sol'r for Complainants.*

5 STATE OF NEW YORK, } ss:
*County of New York,* }

I, William Sohmer, clerk of the county of New York and also clerk of the supreme court for said county, the same being a court of record, do hereby certify that Nelson L. Robinson, before whom

the annexed deposition was taken, was at the time of taking the same a notary public of New York, dwelling in said county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 4th day of April, 1898.

[SEAL.] WM. SOHMER, *Clerk.*

"EXHIBIT A."

*Copy of Last Will and Testament of Charles F. Brainard, Deceased.*

In the name of God, amen. I Charles F. Brainard, of the city of Washington, D. C., being of sound mind and memory, do make and publish and declare this my last will and testament.

I give, devise and bequeath unto my beloved wife Cornelia A. all my property of every kind and description for her own use and benefit forever.

I hereby nominate, constitute and appoint my wife Cornelia A. executrix of this my last will and testament.

In witness whereof I have hereunto set my hand and seal this 12th day of June, in the year of our Lord one thousand eight hundred and seventy-two.

C. F. BRAINARD. [SEAL.]

The foregoing instrument, consisting of one sheet, was, at the date thereof, subscribed by the said C. F. Brainard, the testator, in the presence of each of us and declared by him to be his last will and testament, and we thereupon, at his request and in his presence and in the presence of each other, have hereto subscribed our names as witnesses to the execution thereof.

JOHN P. BIGELOW.
WALTER STEWART.
THOMAS L. JONES.

(Recorded in Will Book No. 19, folio 222.)

EXHIBIT "B."

This indenture, made this eighteenth day of July, in the year one thousand eight hundred and seventy-nine, between Charles H. Lindsley and his wife Silvia A. Lindsley of the city of Washington
D. C. of the first part, and Charles F. Brainard of the same
6 place of the second part. Witnesseth, that said parties of the first part for and in consideration of the sum of sixty-three hundred and fifty dollars, to them in hand paid by said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged hath given, granted, argained, sold, aliened, enfeoffed, released, conveyed, and confirmed, and by these presents do give, grant, bargain, and sell, alien, enfeoff,

release, convey, and confirm unto said party of the second part his heirs and assigns forever, all that certain parcel of land lying and situated in the city of Washington, District of Columbia and known and designated as lot sixty-nine (69) in Charles H. Lindsley's recorded subdivision of lots thirty-five (35) and thirty-six (36) in square one hundred and eighty-two (182) with the buildings, rights, privileges, and appurtenances to the same belonging or in anywise appertaining; and all the estate, right, title, interest, claim and demand whatsoever, both at law and in equity of said parties of the first part or either of them of, in, and to the same.

To have and to hold said parcel of land and premises with the appurtenances unto said party of the second part his heirs and assigns for his — their use and benefit forever.

And the said parties of the first part for themselves, their heirs, executors, and administrators do hereby covenant, bargain, and agree to and with said party of the second part his heirs and assigns, that they the said parties of the first part and their heirs the parcel of land and premises with appurtenances hereinbefore described and mentioned as bargained and sold, unto said party of the second part his heirs and assigns, shall and will warrant and forever defend by these presents against the claims and demands of any and all persons claiming, by, through, under, or in trust for said party of the first part or any person whomsoever. And further that they the said parties of the first part and *his* heirs shall and will at any and all times hereafter at the request and cost of the said party of the second part his heirs and assigns, make and execute any and every other deed of assurance in law for the more, sure, and effectual conveyance of the said parcel of land and premises, with the appurtenances to the said party of the second part his heirs and assigns, that the said party of the second part, his heirs or assigns, or his or their counsel learned in the law shall or may devise, advise or require.

In testimony whereof the said parties of the first part have hereunto set their hands and affixed their seals on the day and year first hereinbefore mentioned.

CHARLES H. LINDSLEY. [SEAL.]
SILVIA A. LINDSLEY. [SEAL.]

Signed, sealed, and delivered in the presence of—the word hath, in line 13, page one, made before execution; interlineation in line 11, page 2, made before execution—
CHARLES W. HANDY.

7 DISTRICT OF COLUMBIA, } *To wit:*
*County of Washington,* }

I, Charles W. Handy, a notary public in and for the county and District aforesaid, do hereby certify that Charles H. Lindsley and Silvia A. Lindsley, his wife, parties to a certain deed bearing date on the 18th of July, 1879, and hereto annexed, personally appeared before me, in the county and District aforesaid, the said Charles H. Lindsley and Silvia A. Lindsley, his wife, being personally well

known to me as the persons who executed said deed, and acknowledged the same to be their act and deed.

And Silvia A. Lindsley, the wife of Charles H. Lindsley, being by me examined privily and apart from her husband and having the deed aforesaid fully explained to her by me, the said Silvia A. Lindsley acknowledged the same to be her act and deed and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and notarial seal this eighteenth day of July, 1879.

CHARLES W. HANDY,
*Notary Public.*

[SEAL.]

EXHIBIT "C."

This indenture, made this 31st day of March, in the year of our Lord one thousand eight hundred and eighty-two, between Cornelia A. Brainard widow of Charles F. Brainard deceased (see will of said Brainard probated Dec. 21st, 1881) of the first part, and Leffert L. Buck of New York city State of New York of the second part,

Witnesseth, that the said party of the first part, for and in consideration of the sum of six thousand three hundred and fifty dollars, in lawful money of the United States, to her in hand paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and does by these presents grant, bargain, sell, alien, enfeoff, release, and convey unto the said party of the second part, his heirs and assigns forever, the following-described real estate situate in the city of Washington and District of Columbia—viz.—all that lot of ground known as lot number sixty-nine (69) of Lindsley's recorded subdivision of sublots number thirty-five (35) and thirty-six (36) in square number one hundred and eighty-two (182)—the said lot and premises being the same mentioned and described in a deed made by and between the parties above named—viz.—between Charles H. Lindsley and wife and the said Charles F. Brainard and dated July 23, 1879, and recorded in the District of Columbia, July 26th, 1879, on Liber 918, folio 357 &c.

Together with all the improvements, ways, easements, rights, privileges and appurtenances and hereditaments to the same belonging, or in anywise appertaining, and all the remainders, reversions, rents, issues, and profits thereof; and all the estate, right, title,
8 interest, claim, and demand whatsoever, either at law or in equity, of the said party of the first part, of, in, to, or out of the said piece or parcel of land and premises.

To have and to hold the said piece or parcel of land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his sole use, benefit and behoof forever.

In testimony whereof, the said party of the first part, has here-

unto set her hand and seal on the day and year first hereinbefore written.

CORNELIA A. BRAINARD. [SEAL.]

Signed, sealed, and delivered in the presence of—
GEO. F. GRAHAM.
W. S. LINCOLN.

DISTRICT OF COLUMBIA, }
*County of Washington,* } *ss:*

I, George F. Graham, a notary public in and for the District aforesaid, do hereby certify that Cornelia A. Brainard, party to a certain deed bearing date on the 31st day of March, A. D. 1882, and hereunto annexed, personally appeared before me, in the District aforesaid, the said Cornelia A. Brainard being personally well known to me to be the person who executed the said deed, and acknowledged the same to be her act and deed.

Given under my hand and notarial seal this thirty-first day of March, A. D. 1882.

GEO. F. GRAHAM,
[SEAL.] *Notary Public.*

Extracted from pages X, Y, & Z.

(EXHIBIT "A.")

Filed April 15, 1898.

*Cash.*

DR.

| | | | | |
|---|---|---|---|---|
| 1879, July | 28. | C. F. Brainard, salary for July | | 151 60 |
| " Aug. | 27. | " " " Aug | | 151 60 |
| " Sept. | 1. | 4 % bond sold | | 100 87 |
| " " | 9. | 4 % " " | | 100 50 |
| " " | 27. | Salary for Sep | | 146 80 |
| " Oct. | 11. | Part of salary for Oct | | 75 00 |
| " " | 13. | 4 % bond # 50 sold | | 50 87 |
| " " | " | Interest | | 1 50 |
| " " | 14. | Rec'd from Jackson Build. Ass'n | | 73 93 |
| " " | 25. | " " bal. of salary for Oct | | 76 60 |
| " Nov. | 1. | Turnbull, Jr., & Co., drawback on carpet | | 2 15 |
| " " | 25. | Salary for month | | 146 80 |
| " " | " | For sale of stove | | 8 00 |
| " Dec. | 12. | Rec'd from Jackson Build. Ass'n | | 76 93 |
| 9 | | | | |
| | 20. | Salary for mo. Dec | | 151 60 |
| 1880, Jan'y | 27. | " " " Jan'y | | 153 30 |

| | | | | |
|---|---|---|---|---|
| Feb. | 10. | Rec'd from Jackson B. Ass'n | | 78 00 |
| Feb. | 27. | " " " Feb | | 143 40 |
| M'ch | 26. | " " " M'ch | | 153 30 |
| Apr. | 28. | " " " Ap'l | | 148 30 |
| May | 14. | Rec'd from Jackson B. Ass'n | | 167 96 |
| May | 27. | " salary for May | | 153 40 |
| June | 18. | " for old clothes | | 6 00 |
| " | 26. | " salary for June | | 148 30 |

For'd.

(Page Y.)

| | | | | |
|---|---|---|---|---|
| 1880, Aug. | 31. | Salary for 2 mo., July & Aug | | 303 20 |
| " | " | Rec'd from Jackson B A | | 88 66 |
| Sept. | 24. | " for salary for Sep | | 146 80 |
| Oct. | —. | Salary | | 151 60 |
| Nov. | —. | Do. | | 146 80 |
| Dec. | —. | Do. | | 151 60 |
| 1881, Jan'y | 12. | Rec'd from Jackson B. A | | 96 64 |
| | 28. | Salary | | 155 00 |
| Feb'y | 17. | Rec'd from Waverly Ass'n ac. 1 share | | 35 98 |
| " | 26. | Salary for Feb'y | | 140 00 |
| M'ch | —. | " M'ch | | 155 00 |
| Apr. | 9. | In full, Nat. Building Ass'n, 5 shares | | 117 60 |
| " | —. | Salary for April | | 148 30 |

EXHIBIT "A."

Pages 2, 3, 4, 5, 122, 123, 129, 262, & 263.

Filed April 15, 1898.

LEFFERT L. BUCK.

DR.

| | | | | |
|---|---|---|---|---|
| 1875. | | | | |
| M'ch | 12. | To cash rec'd | | 220 00 |
| 1876. | | | | |
| M'ch | 12. | " int. " | | 15 40 |
| 1877. | | | | |
| M'ch | 12. | " " " | | 15 40 |
| Sep. | 13. | " cash " | | 200 00 |
| 1878. | | | | |
| M'ch | 12. | " int. " | | 15 40 |
| May | 1. | " " " | | 4 56 |
| Aug. | 1. | " " " | | 4 56 |
| 1879. | | | | |
| Feb. | 1. | " " " | { 5.47 / 4.56 } | 10 03 |
| M'ch | 15. | " cash " | | 1,391 80 |
| Apr. | 1. | " int. " | | 13 50 |
| 10 | | | | |
| June | 2. | " cash " | | 375 00 |

| | | | | | |
|---|---|---|---|---|---|
| July | 3. | " | " | " 2 drafts on N. Y..... { 123.00 / 102.00 } | 225 00 |
| " | 8. | " | int. | " ..... | 16 00 |
| " | 18. | " | sold $1,050, 3.65's @ 87¾..... | | 921 37 |
| " | " | " | " $1,600, 4 % @ 1.02..... | | 1,632 00 |
| | | | | | *5,060 62 |
| Aug. | 11. | " | cash rec'd..... | | 170 00 |
| Sept. | 7. | " | " " ..... | | 175 00 |
| Oct. | 23. | " | " " d'ft..... | | 200 00 |
| Dec. | 16. | " | " " ..... | | 299 69 |
| | | | | | 5,904 91 |

LEFFERT L. BUCK.

Cr.

| | | | | |
|---|---|---|---|---|
| 1878. | | | | |
| May | 1. | By purchased 3.65's @ 73¾..... | | 184 38 |
| Aug. | 9. | " " " @ 81⅞..... | | 245 62 |
| 1879. | | | | |
| M'ch | 18. | " " 4 % @ par..... | | 1,350 00 |
| Apr. | 18. | " " 4 % @ par & accrued int..... | | 50 09 |
| May | 7. | " paid freight on furniture..... | | 7 37 |
| June | 18. | " purchased 4 %, 2½ prem..... | | 205 00 |
| July | 9. | " " $500, 3.65's @ 87⅞..... | | 439 37 |
| " | 18. | " paid purchase-money on house and lot $1632 Rhode Island Ave. N. W..... | | 2,550 00 |
| " | " | " paid insurance of $4,000 on house for 3 years. ..... | | 30 00 |
| " | " | " paid for recording deed..... | | 1 50 |
| | | | | *5,063 33 |
| Aug. | 12. | " purchased 3.65's, D. C., $150.00 @ 86½..... | | 129 75 |
| Sept. | 12. | " " 3.65's, D. C., $206.00 @ 84½..... | | 169 00 |
| Oct. | 11. | " " 3.65's, D. C., $50.00 @ 84¾..... | | 42 38 |
| Dec. | 16. | " " 3.65, D. C., $350.00, @ 85⅝..... | | 299 69 |
| " | 28. | " paid L. L. Buck cash..... | | 40 00 |
| | | Cash on hand forward..... | | 160 56 |
| | | | | $5,904 71 |

LEFFERT L. BUCK.

Dr.

| | | | |
|---|---|---|---|
| 1880. | | To balance on hand..... | 160 56 |
| Jan'y | 5. | " cash rec'd..... | 200 00 |
| Feb. | 2. | " 6 mo. int. on $7.50, 3.65 D. C. bonds..... | 13 68 |
| | 14. | " sold $ 50, 3.65 D. C., @ 93½..... | 46 75 |
| | 19. | " " $ 700, " " " 97½..... | 682 50 |

[* In pencil in copy.]

11

| | | | |
|---|---|---|---|
| M'ch | 2. | cash | 120 00 |
| | 5. | " d'ft on N. Y | 250 00 |
| Apr. | 10. | " " " " | 240 00 |
| May | 7. | " " " " | 200 00 |
| June | 3. | " " " " | 200 00 |
| | | | *2,113 49 |

LEFFERT L. BUCK.

Cr.

| | | | |
|---|---|---|---|
| 1880. | | | |
| Jan'y | 26. | By paid L. L. Buck cash | 20 00 |
| M'ch | 12. | " " note due July 25, '80 | 1,266 66 |
| Apr. | —. | " " cementing cellar, &c | 32 25 |
| June | 8. | " " for 2 bottles glycerite | 1 00 |
| | | *Bal | *793 58 |
| | | | 2,113 49 |

≠1632 *R. I. Ave.—House, Repairs, &c.*

| | | | |
|---|---|---|---|
| 1879. | | | |
| July | 29. | Water rent for 6 mo., July to Jan'y 31 | 2 87 |
| Aug. | 28. | Wife, cash, 1.50; painting, &c., cutting arch 14.00 | 15 50 |
| Sep. | 19. | 2 pr. blinds, hanging, & painting, &c | 8 00 |
| " | —. | Jackson for work & manure for yard | 5 10 |
| " | 27. | Hardware, .80; weather strips, .65 | 1 45 |
| Oct. | 25. | Door strips, &c., 1.60; weather strips, 1.00 | 2 60 |
| | | Weather strips & brads, 1.10; do., &c., 2.00 | 2 40 |
| | | | *37 92 |
| Nov. | 13. | Taxes on house & lot | 45 29 |
| 1880. | | | |
| Jan. | 14. | Ins. on house for $1,000 from Dec. 31, '79 | 3 00 |
| " | 26. | Pd. 6 mo. int. on 3 notes, am't'g to $3,800, @ 7 per cent., due Jan'y 25, '80 | 133 00 |
| M'ch | 12. | Paid int. on 1st, due July 25, '80, taken ac | 25 34 |
| " | 22. | " repairs on range | 1 75 |
| " | 24. | " water rent, Jan'y 1, '80, to '81 | 6 90 |
| June | 8. | " for painting porch | 2 00 |
| " | 9. | " " 2 awnings for porch | 15 00 |
| " | 21. | " " repairing door bell | 1 75 |
| July | 25. | " " 6 mo. int. on 2 notes, am't'g to $2,533.32, @ 7 per ct., due July 25, '80 | 88 67 |
| Aug. | 31. | " " whitewashing kitchen | 75 |
| Sep. | 1. | " for shelving, screens, & drawers | 9 50 |
| | | *370 87 | |
| | | *9 77 | |
| | | | *$361 10 |

[* In pencil in copy.]

12 #1632 *R. I. Ave.—House, Repairs, &c.*

1880. CR.

| | | | |
|---|---|---|---|
| Sept. | 23. | Rep. sink, .50; Oct. 7, rep. water-closet, 1.75... | 2 25 |
| Nov. | 15. | Taxes on house & lot, year ending June 30, '81..... | 45 29 |
| " | 24. | Rep. roof, $1.50; rep. range & latrobe, 2.00.... | 3 50 |
| " | " | Cutting hole in chimney..... | 50 |
| Dec. | 24. | Rep. lock, .35; 1881, Jan. 15, rep. water pipes, 8.00..... | 8 35 |
| 1881. | | | |
| Jan'y | 15. | Ins. #1,000 on house from Dec. 31, '79..... | 3 00 |
| | 28. | Water rent for 1881, 6.33; rep. steps, 1.00..... | 7 33 |
| M'ch | 30. | Rep. locks, .50..... | |
| Nov. | 26. | Taxes on house & lot, year ending Jan. 30..... | 45 29 |
| Dec. | 1. | Fixing range & latrobe..... | 5 85 |
| 1882. | | | |
| Jan'y | 24. | Paid insurance on house & furniture for three years—one thousand on house & one thousand on furniture..... | 11 00 |
| | | Water rent for year ending December 31, 1882..... | 6 33 |
| Feb. | 6. | Paid for repairing gas fixtures..... | 4 35 |
| | 15. | Fixing bell ..... | 2 25 |
| Apr. | 27. | Jackson for repairing in yard, 1.50..... | 1 50 |
| | 29. | Repairing steps, $8.00..... | 8 00 |
| May | 23. | " window..... | 40 |
| July | 18. | Paid insurance on house for three years of four thousand dollars..... | 16 00 |

*C. F. Brainard, ac. ½ Property, 1632 R. I. Ave.*

| | | | |
|---|---|---|---|
| 1880. | | | |
| Sept. | 16. | Paid interest on #2,533.32 (2 notes for) $1\frac{23}{30}$ mo., or 7 p. c. p. a..... | 26 10 |
| " | " " | Wetzel, expenses of transfer of deed of trust to B. Ass'n..... | 24 25 |
| " | " " | on acc't principal—that is, the present deed of trust—$25.20..... ..... | *13 32 |
| Oct. | 12. | " Western B. Ass'n..... | 36 00 |
| Nov. | 12. | " " " ..... | 36 00 |
| Dec. | —. | " " " " ..... | 36 00 |
| '81. | | | |
| Jan'y | —. | " " " " ..... | 36 00 |
| Feb. | —. | " " " " ..... | 36 00 |
| M'ch | —. | " " " " ..... | 36 00 |
| April | —. | " " " " ..... | 36 00 |
| May | 16. | " " " " ..... | 36 00 |
| June | 14. | " " " " ..... | 144 00 |

[* In pencil in copy.]

13

| | | | |
|---|---|---|---|
| Oct. | 6. | " " " " Mr. Stewart..... | 36 00 |
| Nov. | 11. | " " " " " " ..... | 36 00 |
| Dec. | 14. | " " " " " " ..... | 36 00 |
| Jan. 11 of 1882. | | " " " " " " ..... | 36 00 |
| Feb. | 8. | " " " " " " ..... | 36 00 |
| March | 8. | " " " " " " ..... | 36 00 |
| " | —. | Look up one share of the Western B. Ass'n, which came to..... | 114 68 |

*Building Association Acc't.*

| | | | |
|---|---|---|---|
| 1879. | | | |
| Aug. | 8. | Ter. Saving — Loan, &c..... | 5 00 |
| | | Waverly Building Ass'n..... | 11 00 |
| " | 12. | Jackson " " ..... | 7 00 |
| " | 29. | Waverly, for Sep'r, gave Stewart..... ..... | 11 00 |
| " | " | Jackson, " " " " ..... | 7 00 |
| " | 30. | Ter. Savings & Loan, &c., Sep..... | 5 00 |
| Oct. | 6. | " " " ..... | 5 00 |
| " | 13. | Waverly, from Oct., gave Stewart..... | 11 00 |
| " | 14. | Jackson, " " " " ..... | 7 00 |
| Nov. | 11. | Do. Nov. " " ..... | 6 00 |
| | " | Waverly, " " " " ..... | 11 00 |
| | " | Ter. Savings & Co..... | 5 00 |
| Dec. | 3. | Do. ..... | 5 00 |
| | 8. | Waverly ..... | 11 00 |
| | 9. | Jackson ..... | 6 00 |
| | | | *113 00 |
| 1880. | | | |
| Jan. | 12. | Waverly Ass'n ..... | 11 00 |
| | | Jackson..... | 5 00 |
| | | Ter. Saving- & Co..... | 5 00 |
| Feb. | 9. | Waverly ..... | 11 00 |
| | 10. | Jackson..... | 5 00 |
| | | | *5 |
| M'ch | 9. | Waverly, 11.00; 10th, Jackson, $4.00..... | 14 00 |
| Apr. | 12. | Do. 11.00; 13, Jackson, 4.00; 14, Western, 20.00..... | 35 00 |
| May | —. | Waverly, 11.00; Jackson, 4.00; Western, 30.00. | 45 00 |
| 1880. | | Am't ac. | |
| June | 8. | Jackson B. Ass'n..... | 2 00 |
| " | 9. | Western " " ..... | 25 00 |
| " | —. | Waverly ..... | 11 00 |
| " | 26. | Gave Stewart, to dues for July..... | 38 00 |
| | | Mr. Fletcher gave Stewart, ac. dues Aug..... | 38 00 |

[* In pencil in copy.]

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Sep. | 8. | Western, | 25.00; | Waverly, | 11.00; | Jackson, | 1.00. | 37 00 |
| Oct. | 12. | Do. | 7.00; | " | 11.00; | " | 1.00. | 19 00 |
| Nov. | 10. | Do. | 7.00; | " | 11.00; | " | 1.00. | 19 00 |
| Dec. | —. | Do. | 7.00; | " | 11.00; | " | 1.00. | 19 00 |
| 1881. | | | | | | | | |
| Jan'y | —. | Do. | 7.00; | " | 11.00; | " | 1.00. | 19 00 |
| Feb'y | —. | Do. | 7.00; | " | 11.00; | " | ..... | 18 00 |
| M'ch | —. | Do. | 7.00; | " | 10.00..... | | | 17 00 |
| Ap'l | —. | Do. | 7.00–10.00 @ | | 10.00..... | | | 27 00 |
| " | 13. | Do. purchased 10 shares, 120.00; int., &c., 4.10..... | | | | | | 124 00 |
| May | 9. | Waverly ..... | | | | | | 10 00 |

*Restraining Order.*

Upon the complainant filing undertaking, as required by equity rule 42.

The defendants are hereby restrained, as prayed in the within-mentioned bill, until further order, to be made, if at all, after a hearing, which is fixed for the 25th day of April, 1898, of which take notice; and it is further ordered that a copy hereof be served on Leo Simmons, Esq., att'y for Wm. H. Brainard, defendant.

By the court:

W. S. COX, *Justice.*

*Separate Demurrer of William H. Brainard.*

Filed April 27, 1898.

In the Supreme Court of the District of Columbia.

LEFFERT L. BUCK and JAMES COLEMAN *vs.* WILLIAM H. BRAINARD ET AL. } Equity. No. 19275.

This defendant, by protestation, not confessing all or any of the matter and things in said bill of complaint to be true in such manner and form as the same are set forth and alleged, doth demur to said bill, and for cause of demurrer shows:

1. That said complainants have not by their said bill made such a case as entitles them in a court of equity to any relief against this defendant.

2. That it appears by the said bill that neither the promise or contract which is alleged by the said bill, and of which the plaintiffs by the said bill seeks to have the benefit, nor any memorandum or note thereof, was ever reduced to writing or signed by the said Charles F. Brainard, deceased, or any person authorized thereunto, within the meaning of the statute for the prevention of frauds and perjuries as is in operation and in force in the District of Columbia.

3. That complainant's said bill is vague, uncertain, and bad in substance and form.

15 4. That complainant Leffert L. Buck is guilty of gross and inexcusable laches by reason of the great delay in bringing his said suit.

5. That the complainant James Coleman has no interest, as is shown by the bill of complaint, and therefore not a necessary party to said suit.

Wherefore, and for divers other good causes of demurrer appearing on the face of said bill, this defendant doth demur thereto and prays the judgment of this honorable court whether he should be compelled to make further or other answers to said bill, and prays to be hence dismissed with his reasonable cost.

LEO SIMMONS,
*Attorney for Defendant.*

I hereby certify that in my opinion the above demurrer is well founded in law.

LEO SIMMONS,
*Attorney for Defendant.*

The signature and oath of the defendant to this demurrer is hereby waived.

JOS. A. BURKART,
*Solicitor for Complainants.*

*Decree Sustaining Demurrer.*

Supreme Court of the District of Columbia.

MONDAY, *May* 2, 1898.

Court meets pursuant to adjournment.

* * * * * * *

LEFFERT L. BUCK ET AL.
*vs.*
WILLIAM H. BRAINARD ET AL. } 19275, Equity Docket 44.

This case coming on to be heard on the demurrer of the defendant William H. Brainard, and having been argued by counsel for the parties and considered by the court, it is therefore, this 2nd day of May, 1898, adjudged, ordered, and decreed that said demurrer be, and the same is hereby, sustained with cost to the defendant William H. Brainard, and that the plaintiffs have twenty days in which to amend their bill of complaint as they may be advised; that the sustaining of the demurrer be without prejudice to the restraining order for said period of twenty days from this date.

W. S. COX, *J.*

16 *Amended Bill, &c.*

Filed May 21, 1898.

In the Supreme Court of the District of Columbia, A. D. 1898.

LEFFERT L. BUCK and JAMES COLEMAN
*vs.*
WILLIAM H. BRAINARD, EDWARD ALBERT Brainard, and Eva Hanmore.
} In Equity. No. 19275.

To the supreme court of the District of Columbia, holding an equity court:

Humby complaining unto your honors, for an amended bill of complaint, the plaintiffs state as follows:

1. They are citizens of the United States, the plaintiff Leffert L. Buck residing in the city and State of New York, and the plaintiff James Coleman residing in Washington, D. C., and they bring this suit, the plaintiff Leffert L. Buck as having the equitable title to the premises hereinafter described, and the plaintiff James Coleman as being in possession as lessee from said Buck of said premises.

2. The defendants are citizens of the United States, and reside, the defendant William H. Brainard at Galesburg, in the State of Illinois, and the defendants Edward Albert Brainard and Eva Hanmore at Tyoomick, Cook's inlet, in the Territory of Alaska, and that they claim to recover the possession of the premises hereinafter described as being the next of kin and heirs-at-law of one Charles F. Brainard, deceased, hereinafter mentioned.

3. That there is a suit pending on the law side of this court, which is the suit of William H. Brainard against James Coleman, No. 41274, and which is brought to recover the possession of a one-third undivided part of that piece or parcel of ground and premises lying and being in the city of Washington, District of Columbia, known on the ground plan or plat of said city as lot numbered sixty-nine (69), in C. H. Lindsley's subdivision of lots, in square numbered one hundred and eighty-two (182), and for damages for the unlawful occupation and detention thereof, as will more fully appear by reference thereto and to the papers and proceedings therein on file in the clerk's office of said court.

4. That on the 12th day of June, 1872, one Charles F. Brainard duly made and executed his last will and testament, by which he devised and bequeathed unto his wife, Cornelia A. Brainard, all of his property of every kind and description for her own use and benefit forever, a copy of which will is annexed to the original bill of complaint filed herein and marked "Exhibit A."

5. That thereafter and on the 18th day of July, 1879, there was conveyed to the said Charles F. Brainard by deed the premises hereinafter referred to and described, a copy of which deed is annexed to the original bill of complaint filed herein and marked "Exhibit B."

17 6. That on the 31st day of March, 1882, the said Cornelia A. Brainard, the widow of the said Charles F. Brainard, by deed duly conveyed the said premises to the plaintiff Leffert L. Buck, a copy of which deed is annexed to the original bill of complaint filed herein and marked "Exhibit C."

7. That the said Charles F. Brainard died on the 13th day of May, 1881, and the said Cornelia A. Brainard, his widow, died on the 31st day of March, 1892.

8. The plaintiffs further show that the plaintiff Leffert L. Buck, was the brother of the said Cornelia A. Brainard, deceased, and that her husband, the said Charles F. Brainard, deceased, was in his lifetime employed as a clerk in the Treasury Department; that said Charles F. Brainard, deceased, had little or no means of support outside of the salary which he received as clerk, as aforesaid.

9. That from March 12, 1875, until June 3, 1880, the said plaintiff, Leffert L. Buck, sent to the said Charles F. Brainard, for investment as agent for him, the said Leffert L. Buck, various sums of money—the particular amounts of which and the dates at which they were received by said Charles F. Brainard, deceased, are stated in "Exhibit D," hereto annexed—and authorized the said Charles F. Brainard, as agent for him, the said Leffert L. Buck, to invest the same in real-estate bonds and securities in the city of Washington; that on or about the 18th day of July, 1879, the said Charles F. Brainard purchased the said property and premises hereinbefore described for the sum of $6,350, and paid on said purchase price the sum of $2,550 out of the moneys so sent to him for investment by the said plaintiff, Leffert L. Buck, as aforesaid; that upon said purchase the said Charles F. Brainard took the deed of said property to himself without the knowledge, consent, or authority of said plaintiff so to do; that said deed is the same deed hereinbefore mentioned as "Exhibit B;" that thereafter and on or about March 12, 1880, said Charles F. Brainard made a further payment of $1,266.66 on said property out of said moneys so sent to him for investment by said plaintiff, Leffert L. Buck as aforesaid; that on the 8th day of June, 1880, there still remained in the hands of said Charles F. Brainard out of the said moneys so received by him for investment as agent for the said plaintiff, Leffert L. Buck, the sum of $793.58, no part of which has ever been repaid to or received by said plaintiff; that on or about the 25th day of July, 1879, said Charles F. Brainard executed to John F. Waggaman and James A. Harban, Trs., a deed of trust on said property to secure payment of the balance of the purchase-money then unpaid thereon, and that said deed of trust was executed without the knowledge, consent, or authority of the said plaintiff, Leffert L. Buck; that after the 8th day of June, 1880, and before his death, the said Charles F. Brainard made further payments on said property, not exceeding in amount the sum of $650, out of the said moneys so received by him from said plaintiff for investment as aforesaid, the particular dates
18 of which payments plaintiffs are unable more definitely at this time to state, for the reason that the books and accounts

of the Western Building Association, to which said payments were made, have been destroyed.

10. That after the death of the said Charles Brainard the plaintiff Leffert L. Buck was informed by his said sister, Cornelia A. Brainard, that she held the legal title to said property under the last will and testament of her said husband, which is the instrument hereinbefore mentioned as "Exhibit A," and that there remained unpaid upon said trust deed the sum of $1,971.81; that thereupon, and on or about the 17th day of March, 1882, said plaintiff, Leffert L. Buck, paid the balance due upon said trust deed, which was thereupon discharged, to wit, the sum of $1,971.81; and thereafter, and on the 31st day of March, 1882, the said Cornelia A. Brainard conveyed the said property to him by the deed referred to as "Exhibit C," and the said plaintiff, Leffert L. Buck, thereupon and on that day entered into and has ever since remained in undisturbed possession of said premises.

11. And the plaintiffs further show that all of the moneys that were paid for the purchase of said property, including the whole consideration thereof, were paid by the plaintiff Leffert L. Buck.

12. And the plaintiffs further show that not until after the said action at law No. 41274, which is the suit of said William H. Brainard against James Coleman, had been brought had the plaintiff Leffert L. Buck any information that the legal title to said premises did not pass to his sister, the said Cornelia A. Brainard, under the will of her said husband, Charles F. Brainard.

13. That the said Charles F. Brainard, at his death, left him surviving, as these plaintiffs are informed and believe, as his next of kin Frances A. Peck and Caroline B. Farrar, his sisters, and Aaron Brainard, Albert Brainard, and William H. Brainard, his brothers, and no descendants; that neither he, the said Charles F. Brainard, nor his next of kin, nor either or any of them, ever paid any money or other valuable things towards or on account of the purchase of said property; that thereafter and during the year 1888 said Albert Brainard died, leaving him surviving Eva Brainard, his widow, who has since married one Thomas W. Hanmore, and said Edward Albert Brainard, his son and only child and heir-at-law, who is an infant under 21 years of age; that said Aaron Brainard has died, leaving him surviving Mary Emeline Day, wife of Rev. Alfred Day, his daughter and only child and heir-at-law.

14. That since the beginning of said action at law said Frances A. Peck and David B. Peck, her husband; Caroline B. Farrar, a widow, and Mary Emeline Day and Rev. Alfred Day, her husband, well knowing that the said Leffert L. Buck had paid the whole consideration for said premises, have quitclaimed the said property to the said Leffert L. Buck.

To the end, therefore, that the plaintiffs may have that relief which they can only obtain in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, answer under oath being expressly waived by the plaintiffs,

and that the said defendant, who is plaintiff, as aforesaid,
19 in said action at law, and the said defendants, Eva Hanmore and Edward Albert Brainard, may be perpetually enjoined

from further prosecuting the same, and that it may be declared that said lands are charged with a trust in favor of and ought to be held for the use and benefit of the said plaintiff, Leffert L. Buck, and that the said defendants or so many of them and such of them as shall appear to have the legal title to said lands may be decreed to convey such legal title, free of all encumbrances done or suffered by them or any or either of them, unto the said plaintiffs in their said capacity, to hold to them and their, &c., upon the trusts aforesaid, and for such further and other relief as the nature of this case may require and to your honors seems meet—

May it please, &c., your honors to grant unto the plaintiffs a writ of subpœna, to be directed to the said defendants, William H. Brainard, Edward Albert Brainard, and Eva Hanmore (the said Edward Albert Brainard being an infant under the age of twenty-one years), thereby commanding them and each of them, at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court, and then and there full, direct, true, and perfect answer make to all and singular the premises; and, further, to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem meet.

L. L. BUCK.
J. COLEMAN.

JOS. A. BURKART,
*Sol'r for Compl'ts.*

The defendants are:
William H. Brainard, Galesburg, Illinois.
Edward Albert Brainard, Tyoomick, Cook's inlet, Alaska.
Eva Hanmore, Tyoomick, Cook's inlet, Alaska.

STATE OF NEW YORK, } ss.:
*County of New York,* }

I do solemnly swear that I have read the bill by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

L. L. BUCK.

Subscribed and sworn to before me this 19th day of May, 1898.

NELSON L. ROBINSON,
*Notary Public, N. Y. Co., No. 41.*

Objection to the absence of notarial seal to verification and of clerk's certificate is hereby expressly waived.

LEO SIMMONS,
*Sol'r for Defendants.*

20 EXHIBIT "D."

*Statement of Moneys Entrusted to Charles F. Brainard, Deceased, for Investment by the Plaintiff Leffert L. Buck.*

| | | | |
|---|---|---|---|
| 1875. | | | |
| March | 12. | Cash | $220.00 |
| 1876. | | | |
| March | 12. | Interest | 15.40 |
| 1877. | | | |
| March | 12. | Interest | 15.40 |
| September | 13. | Cash | 200.00 |
| 1878. | | | |
| March | 12. | Interest | 15.40 |
| May | 1. | Interest | 4.56 |
| August | 1. | Interest | 4.56 |
| 1879. | | | |
| February | 1. | Interest | 10.03 |
| March | 15. | Cash | 1,391.80 |
| April | 1. | Interest | 13.50 |
| June | 2. | Cash | 375.00 |
| July | 3. | 2 drafts on New York | 225.00 |
| July | 8. | Interest | 16.00 |
| July | 18. | Proceeds sale of bonds | 921.37 |
| | | " " " | 1,632.00 |
| August | 11. | Cash | 170.00 |
| September | 7. | Cash | 175.00 |
| October | 23. | Draft | 200.00 |
| December | 16. | Cash | 299.69 |
| 1880. | | | |
| January | 5. | Cash | 200.00 |
| February | 2. | Interest | 13.68 |
| February | 14. | Proceeds sale of bonds | 46.75 |
| February | 19. | Proceeds sale of bonds | 682.50 |
| March | 7. | Cash | 120.00 |
| | 5. | Draft on New York | 250.00 |
| April | 10. | Draft on New York | 240.00 |
| May | 7. | Draft on New York | 200.00 |
| June | 3. | Draft on New York | 200.00 |
| | | | 7,857.04 |

21 *Demurrer to Amended Bill.*

Filed May 25, 1898.

In the Supreme Court of the District of Columbia.

LEFFERT L. BUCK and JAMES COLEMAN
vs.
WILLIAM H. BRAINARD ET AL. } Equity. No. 19275.

The joint demurrer of defendants, William H. Brainard, Eva Hanmore, and Edward Albert Brainard, by his next friend, Eva Hanmore, to the amended bill of complaint in the above cause.

These defendants, by protestation, not *by* confessing all or any of the matter- and things in said bill of complaint to be true in such manner and form as the same are set forth and alleged, do*th* demur to said bill and for cause of demurrer shows:

1. That complainants have not by their said bill made a case as entitles them in a court of equity to any relief against these defendants.

2. That it appears by the said bill that neither the promise or contract which is alleged by the said bill and of which the plaintiffs by the said bill seeks to have the benefit, nor any memorandum or note thereof, was ever reduced to writing or signed by the said Charles F. Brainard, deceased, or any person authorized thereunto, within the meaning of the statute for the prevention of frauds and perjuries as is in operation and in force in the District of Columbia.

3. That complainants' said bill is vague, uncertain, and bad in substance and form.

4. That complainant Leffert L. Buck is guilty of gross and inexcusable laches by reason of the great delay in bringing his said suit.

5. That the complainant James Coleman has no interest as is shown by the bill of complaint, and therefore not a necessary party to said suit.

6. The complainants by their amended bill have attempted to make a different and new cause of action from the one alleged in their original bill.

Wherefore, and for divers other good causes of demurrer appearing on the face of said bill, these defendants do*th* demur thereto and pray the judgment of this honorable court whether they should be compelled to make further or other answers to said bill, and pray to be hence dismissed with their reasonable cost.

LEO SIMMONS,
*Sol'r for Def'ts.*

I hereby certify that in my opinion the above demurrer is well founded in law.

LEO SIMMONS,
*Sol'r for Def'ts.*

22 The signature and oath of the defendants to this demurrer is hereby waived.

JOS. A. BURKART,
*Sol'r for Compl'ts.*

*Order Overruling Demurrer.*

Filed May 27, 1898.

In Supreme Court of the District of Columbia.

LEFFERT L. BUCK ET AL. vs. WILLIAM H. BRAINARD ET AL. } Eq. No. 19275.

This cause coming on to be heard upon the amended bill of complaint and the demurrer thereto, and having been fully argued by counsel for the respective parties, plaintiff and defendant, upon consideration thereof, it is, this 27th day of May, 1898—

Ordered that the said demurrer of the said defendants be, and the same is hereby, overruled with costs to the plaintiffs, and the defendants are granted ten days from the date hereof, within which to answer said amended bill of complaint, and that the restraining order heretofore granted herein shall stand and remain in full force and effect until hearing upon motion to dissolve the same.

W. S. COX, *J.*

*Answer of Defendant Brainard et al.*

Filed June 21, 1898.

In the Supreme Court of the District of Columbia.

LEFFERT L. BUCK and JAMES COLEMAN vs. WILLIAM H. BRAINARD ET AL. } Equity. No. 19275.

The joint and several answers of William H. Brainard, Eva Hanmore, and Edward Albert S. Brainard, by his next friend, Eva Hanmore, to the amended bill filed in the above cause.

The defendants, not admitting or waiving the insufficiency of the grounds set up in their demurrer to defeat the plaintiffs' cause of action, but insisting that the same is well founded in law, and not waiving any of the many defects in the amended bill, and for the purpose of making a complete answer to both of said bills, each of which makes a separate and distinct case, deem- it necessary to file an answer to each, for answer to said amended bill says:

1. The defendant- admits so much of paragraph 1 of said bill as stating residence and capacity in which plaintiff sued; but they deny that the plaintiff Leffert L. Buck has any legal or equitable interest in the premises described in said bill. They admit that James Coleman is in possession of same.

23 2. They admit paragraph 2 of said bill, that they claim the right to possession of the undivided third interest in the property described in bill.

3. They admit paragraph 3 of said bill.

4. As to paragraph 4 of said bill, defendants neither admit or deny the same, but call for strict proof so far as it may be material to their interest.

5. They admit paragraph 5 of said bill.

6. As to paragraph 6 these defendants are not informed, therefore neither admit nor deny same, but call for strict proof thereof so far as it may be material to their interest.

7. They admit paragraph 7 of said bill.

8. As to paragraph 8, the defendants admit, so far as they are informed and believe, Cornelia A. Brainard was a sister of the plaintiff, and that her husband, Charles F. Brainard, was a clerk in the Treasury Department. As to the remaining part of said paragraph, "and with little or no means of support," they deny the same to be a fact, but, on the contrary, allege that the said Charles F. Brainard received a large salary as an employee of the United States Government in the Treasury Department, in the District of Columbia; that from September, 1864, to March, 1865, he received a salary of $1,400.00 per annum; from March 1st, 1865, to July 1st, 1866, a salary of $1,600 per annum; from August 1st, 1867, to May 13th, 1881, the date of his death, he received a salary of $1,800.00 per annum. They deny that he had no means of support other than the salary aforesaid.

9. As to paragraph 9 of said amended bill, they deny that said plaintiff ever sent any money to the said Charles F. Brainard for investment, or that he ever sent any of the amounts alleged in his so-called Exhibit "D" in his amended bill, or that said Charles F. Brainard was ever instructed to purchase or did ever purchase any real estate on behalf of the plaintiff Leffert L. Buck, but, on the contrary, they allege that said Charles F. Brainard was a clerk in the Treasury Department, as aforesaid, and, having no time of his own in which to speculate in stocks or bonds, at various times sent money to said Buck to invest for him, the said Charles F. Brainard.

The defendants further answering to said paragraph, they deny that said Charles F. Brainard took the title in his own name, without the knowledge of the said Buck. They admit that the deed described as Exhibit "B" is the deed under which said Brainard took title to the said property.

And, further answering to said paragraph, defendants say that Charles F. Brainard purchased said property for his own use with his own funds, and they specifically deny that any money whatever that belonged to the plaintiff Leffert L. Buck was ever invested in the said property by the said Charles F. Brainard.

In further answer to said paragraph, defendants deny that said Charles F. Brainard, on the 8th day of June, 1880, had any amount of money whatever in his hands belonging to the plaintiff Leffert L. Buck. As to that part of said paragraph relating to a deed
24 of trust made by Charles F. Brainard to Waggaman and Harlan, trustees, they admit that said Charles F. Brainard

made said deed of trust, but as to the fact whether or not it was made with or without the knowledge of plaintiff Leffert L. Buck, they deem it immaterial, as said Charles F. Brainard had a perfect right to mortgage his own property; therefore they neither deny or affirm the same.

They admit that said Charles F. Brainard made further payments on the property after said date, but they deny that it was from any money belonging to the plaintiff Leffert L. Buck, but, on the contrary, aver that it was Charles F. Brainard's own money. All of the remaining part of said paragraph not answered by defendants is denied to be a fact.

10. As to the allegations in paragraph 10 that Cornelia A. Brainard informed the plaintiff Leffert L. Buck that she held the legal title to the said property, these defendants deny same to be a fact. As to the charge that the plaintiff Leffert L. Buck paid the sum of $1,981.81, being the amount due upon said property under a deed of trust, these defendants deny the same to be a fact, or that the said Leffert L. Buck paid the balance of the purchase-money in a legal sense.

Whether or not said Cornelia A. Brainard executed the deed mentioned in Exhibit "C" these defendants are not informed, there being no such deeds of record among the land records of the District of Columbia; therefore they call for strict proof of same if it may be material to their interest.

As to that part of paragraph 10 in the amended bill alleging that the plaintiff Leffert L. Buck entered into the possession of said property on the 31st day of March, 1882, and has remained in possession ever since, these defendants deny the same; but, on the contrary, allege that said Cornelia A. Brainard, after the death of her husband aforesaid, occupied the said premises to the day of her death, in March, 1892, and these defendants, not knowing or supposing that any one claimed the title to said property, other than the said Cornelia A. Brainard and the heirs-at-law of said Charles F. Brainard, were willing to allow her as their relative, the widow of said Charles F. Brainard, to remain in possession of said property until her death, and not knowing that the plaintiff had set up any claim whatever to said property.

11. As to the allegations contained in paragraph 11, that said Buck paid all the money that was paid for the purchase of said property, including the whole consideration thereof, or that he paid any amount whatever, as alleged, these defendants deny the same to be a fact.

12. As to paragraph 12, these defendants are not informed as to the time *of* the said Leffert L. Buck ascertained that the will of Charles F. Brainard did not pass the title to the said property and therefore can neither admit or deny the same, but call for strict proof thereof so far as it may be material to their interest.

13. As to paragraph thirteen of said bill, as relating to the allegations of heirship and next of kin to said Charles F. Brainard, these defendants admit the same to be a fact, but as to the
25 allegation that neither the said Charles F. Brainard or his next of kin ever paid any valuable thing toward or on ac-

count of the purchase of said property, these defendants deny the same to be a fact, and, on the contrary, aver that said Charles F. Brainard paid for said property with his own means.

As to the allegations that certain of the heirs of said Charles F. Brainard have quitclaimed said property to the plaintiff, these defendants have no knowledge thereof, there being no such deeds of record in the office of the recorder of deeds for the District of Columbia. Therefore they neither admit or deny the same, but call for strict proof thereof if it may be necessary.

As to the allegations that the parties alleging to have made said quitclaims well knew that the said Buck had paid the whole of the consideration for said property, these defendants deny the same to be a fact, and, on the contrary, allege that the parties making the quitclaims deeds have no knowledge whatever of said transactions, except what they have been informed of by the said Buck.

And, further answering said bill, the defendants say that on the 18th of July, 1879, the said Charles F. Brainard purchased the property mentioned in this bill from one Charles H. Lindsley, paying part of the purchase-money from his own funds in cash, said property being conveyed to him by deed recorded July 18th, 1879, in Liber 920, folio 249, of the land records of the District of Columbia; that on said 18th July, 1879, the said Charles F. Brainard and wife, Cornelia A., executed and delivered to John F. Waggaman and John Sherman, trustees, a deed of trust to secure the notes of said Charles F. Brainard, payable to the order of Charles H. Lindsley, amounting to the sum of $3,800.00, being part of the purchase-money for said real estate, said deed being recorded on July 18, 1879, in Liber 920, folio 252 of the said land records; that thereafter said notes were fully paid by said Charles F. Brainard, and on the 25th day of July, 1879, by deed recorded in Liber 917, folio 476, of said land records, the said deed of trust was released and discharged to said Charles F. Brainard.

That thereafter, on the 25th day of July, 1879, the said Charles F. Brainard and wife, Cornelia, executed and delivered to John F. Waggaman and James A. Harlan, trustees, a deed of trust on said property, to secure the notes of Charles F. Brainard, payable to the order of Charles H. Lindsley, amounting to the sum of $3,800.00, the said deed being recorded July 26th, 1879, in Liber 918, folio 359, of said land records; that thereafter the said Charles F. Brainard having fully paid the said note, the said John F. Waggaman and James A. Harlan, trustees, by deed dated the 17th day of September, 1880, and recorded in Liber 945, folio 451, of the said land records, released and discharged said property to said Charles F. Brainard.

That on the 14th day of September, 1880, the said Charles F. Brainard and wife, Cornelia, by deed conveyed said property to Edward S. Wescott and Wilmer W. Wetzel, trustees of the Western Building Association, to secure said building association the
26 sum of $2,520.00, evidenced by the bond of said Charles F. Brainard, payable in installments of $36 per month until paid; that thereafter the said deed of trust was released to said Charles F. Brainard and recorded in Liber 1003, folio 39, of said

land records. Every allegation in said amended bill not specifically admitted by the answer is denied.

These defendants therefore deny that the plaintiffs are entitled to the relief prayed for in their bill or any relief whatever from these defendants, and therefore pray to be hence dismissed with their reasonable cost.

WILLIAM H. BRAINARD.

LEO SIMMONS,
*Sol'r for Def'ts.*

STATE OF ILLINOIS, } ss:
*Knox County,* }

I do solemnly swear that I have read the bill by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

WM. H. BRAINARD.

Subscribed and sworn to before me the 13th day of June, A. D. 1898.

WILFRED ARNOLD,
[SEAL.] *Notary Public, Knox County, Illinois.*

*Replication.*

Filed July 7, 1898.

In the Supreme Court of the District of Columbia, this 7th Day of July, 1898.

LEFFERT L. BUCK ET AL.
*vs.*
WILLIAM H. BRAINARD ET AL. } In Equity. No. 19275.

The complainants hereby join issue with the defendants William H. Brainard and Eva Hammore upon their answers filed in this cause to the amended bill of complaint.

JOS. A. BURKART,
*Solicitor for Complainants.*

27 *Deposition of Complainant L. L. Buck.*

Filed April 15, 1899.

In the Supreme Court of the District of Columbia.

LEFFERT L. BUCK, having been duly sworn, testified as follows:

By Mr. ROBINSON:

Q. State whether you are one of the plaintiffs to this action.
A. I am.
Q. And are a citizen of the United States?
A. Yes.

Q. Where do you reside?
A. New York city.
Q. What is your business?
A. Civil engineer.
Q. Did you know the late Charles F. Brainard in his lifetime?
A. Yes.
Q. State what relation he was to you, if any.
A. He married my sister, Cornelia A. Buck.
Q. When did your acquaintance with Mr. Brainard begin?
A. It was about 1856.
Q. On what occasion?
A. At Canton, St. Lawrence county, New York, when he came there to marry my sister.
Q. After Mr. Brainard married your sister, where did he live?
A. In Keene, N. H.
Q. Until about what time?
A. My impression is that he lived there until about the time of the war: he went to the army, I think, from there.
Q. And when he left the army where did he reside?
A. He came to Washington.
Q. About when was that?
A. About 1863.
Q. And from that time until his death where did he reside?
A. In Washington.
Q. And your sister, Mrs. Brainard, lived with him?
A. Yes.
Q. When did Mr. Brainard die?
A. I think in May, 1881.
Q. The 13th of May, 1881?
A. About that time; yes.
Q. Did he leave and children or descendants of children?
A. No.
Q. State whether his wife survived him.
A. Yes.
Q. And she died about when?
A. She died, I think, in 1892.
—. ——.
A. Yes.
Q. What was Mr. Charles F. Brainard's business in Washington, if you know?

(Objected to by Mr. Simmons as immaterial and incompetent.)

A. He was a clerk in the Treasury Department.
Q. Before the death of Charles F. Brainard did you have certain business transactions with him?
A. Yes.
Q. You may state what those transactions were and state about when they began.

A. In 1875 I was preparing to go to Peru, South America,
28 to work at my profession. Previous to going I had a little money which I requested Mr. Brainard to take and invest

for me as my agent, telling him that from time to time as I had money to be invested I would send it to him for that purpose. He agreed to act as such agent. After I returned from Peru and was in this country, I continued to send him money, as I had it to spare, for investment, and he continued investing it.

Q. Before starting for Peru did you send him any money?

A. Yes; I sent him $200.

Q. About when?

A. About the 12th of March, 1875. I sailed for Peru the 29th of March.

Q. About what time did you return from Peru?

A. I returned in April or May; I think it was April I arrived in New York.

Q. Of what year?

A. Of 1876—Centennial year.

Q. State what, if anything, you did with reference to sending him money for investment after you returned.

(Question objected to by Mr. Simmons as leading.)

A. I sent him money as I had it to invest, as usual. Do you want me to go on and state the whole transaction?

Q. Yes; go right on and state your transaction with him.

A. About 1878, as I had no settled home, I suggested to him that we should buy a house together in Washington, for my part as headquarters, and to be a home for himself and his wife.

Q. State whether you are married or not.

A. I am not married.

Q. Never have been?

A. No.

Q. Go on with your testimony.

A. After we had talked about several different houses we finally decided to buy the house 1632 Rhode Island avenue, which Mr. Brainard wrote to me could be obtained for $6,350.

Mr. SIMMONS: I want to note an objection to all this testimony as being contrary to the statute of frauds and incompetent and irrelevant.

By Mr. ROBINSON:

Q. Was the letter lost?

A. I replied that if he was satisfied that the house was worth the money and would be a pleasant place to live he should buy it, I to pay one-half and he the other half.

Q. Where were you at this time, Mr. Buck?

A. My business was at Niagara or Suspension Bridge?

Q. In the State of New York?

A. Yes; below Niagara Falls at that time.

Q. State what you were doing there at that time.

A. I was rebuilding the old suspension bridge.

Q. Now go on with the transactions.

A. I learned early in 1880 that Mr. Brainard had taken the property in his own name.

Q. State whether you ever told him——

Mr. SIMMONS: I object and shall have to insist that leading questions be not put to the witness.

Mr. ROBINSON: I will finish my question.

29 Q. State whether you ever told him to take the deed in his own name.

A. No.

Q. State whether you had any knowledge that he expected so to take the deed.

(Objected to by Mr. Simmons as leading.)

Mr. ROBINSON: I will change the form of the question.

Q. State what knowledge you had, if any, in regard to taking the deed in his own name.

A. When we agreed to buy the house together I supposed it would be in the names of both. Along early in 1880 I learned that the property had been bought in his name alone. In the summer of 1880 I spoke to him about it and told him that if he would transfer the property to me in my name I would pay for the balance, and that he could have it for his home.

Mr. SIMMONS: I want to note an objection to all this testimony, as being irrelevant and incompetent.

The WITNESS: He did not wish to transfer the property to me. I understood, in fact he told me, that when he recovered—he was sick at the time—he would be able to go on and pay the balance on the house, and would also be able to pay me for my part of it and own it in his own name, and he thought that would be better than to go to the expense of two transfers of the property.

By Mr. ROBINSON:

Q. State what the condition of his health was at that time.

A. He was sick and nervous at the time, and I was afraid that he was not going to recover very soon, if ever.

Q. What was his disease?

A. At that time we did not know what his disease was; it turned out afterwards to be Bright's disease. We were all anxious about him.

Q. Now go on with your statement of the transactions between you and him.

A. He said that in any event, if he should be taken away, the property would go to his wife, all he had, and he also gave me a statement of the transactions that he and I had had in regard to money.

Q. Was that statement in writing?

A. Yes; in his own handwriting.

Q. And you have that statement?

A. I have that statement. I haven't it with me, however. When he died—he died very suddenly when it did come. He had visited me in Brooklyn to consult with a physician in that city, and had

received some treatment from him. When he left me he thought his health was improved considerably, and he appeared better. He returned to Washington with the intention of getting a leave of absence and going with his wife to Fortress Monroe. Shortly after he had returned to Washington I received a telegram from William P. Titcomb, a friend of Mr. Brainard's family, saying that Mr. Brainard was paralyzed, and to come on immediately. I came down here and found him in a comatose condition. He continued
30 in that condition a day or two, and died without coming out of it. I procured a casket for the body and took it and his wife to Canton, St. Lawrence county, at the request of his wife, and buried his body in our family lot in the cemetery.

Q. To go back to the time when Mr. Brainard and you were talking about paying for the house, have you stated all you remember of the conversation?

A. All that occurs to me now.

Q. State whether he said anything to you about his financial circumstances at that time. If so, what did he say?

A. I do not remember his saying anything about his financial circumstances, except I remember of his saying that he had invested some money in a building association here in Washington city, and that the secretary of that association had been losing the money and had swamped it, and he had thus lost the money that he intended to use to make the first payment on the house.

Q. Do you remember anything about a will?

A. I do not remember anything about a will, except I have the impression, as I believe I stated before, that he said that whatever property he had would go to his wife.

Q. Did he say anything about a will at that time?

A. No, he did not say anything about a will that I know of.

Q. Where was he living immediately before his death?

A. At 1632 Rhode Island avenue.

Q. And after his death where did his widow live?

A. The same place, the same house.

Q. Until when?

A. Until she died, in 1892.

Q. And after her death who took possession of the premises?

A. I did.

Q. And who has been in possession of them since that day?

A. I have. Since that date I have been to the expense of all repairs.

Q. State whether, during the time Mr. Brainard occupied the premises, he ever paid rent for the use of the house.

A. No.

Q. State whether Mrs. Brainard ever paid any rent for the use of it.

A. No.

Q. After the death of Mrs. Brainard, were there certain papers in the house? What became of her effects?

A. I took all the papers there were and took them home with me.

Q. Among those papers what did you find with reference to Mr. Brainard's accounts?

A. I found Mr. Brainard's account book.

Q. (Showing witness book heretofore marked as Exhibit A to the affidavit of complainant L. L. Buck and now marked as Exhibit No. 1, A. J., examiner, December 10, 1898.) State how that book came into your possession.

A. It came into my possession among the papers that I found in the house after Mrs. Brainard died.

Q. State whether it is in the condition in which it was when it came into your possession.

A. So far as I can see.

Q. So far as you can see what?

A. So far as I know.

Q. So far as you know, what about the condition?

A. So far as I know, it is in the same condition that it was when I received it, with the exception of the marks that the stenographer has just placed on it.

31 Q. Look at it and see whether there are any other marks that have been added.

A. I don't remember of any marks on the first and second pages.

Q. Read what was on it.

A. "C. F. Brainard. Private. July 26, 1879." That is in his handwriting.

Q. Do you know the handwriting of Mr. Brainard?

A. Yes.

Q. State what pages in that book are in his handwriting.

A. Do you want me to go through the whole of it?

Q. Yes.

A. Well, page with the letter B on the margin and on page C, page H, the back of page X, and the heading of page 1, marked 'Cash cr.;" then there are some figures and some writing in lead, pencil that I should think were his handwriting; then on the back of page Y; and then the pages are numbered, and there is an account here between himself and me on pages 2, 3, 4, 5, on page 13, and on pages 15 and 16. I do not see anything more.

Q. Is there not something along toward the end?

A. There is something here on page 81 that I should think is in Mrs. Brainard's handwriting.

Q. You know Mrs. Brainard's handwriting?

A. Yes; page 87 I am not certain about; the lower part of this page, I should say, is in Mrs. Brainard's handwriting.

Q. And the upper part is whose, that in blue ink?

A. I am not so certain; it has a good deal of resemblance to his hand.

Q. We do not care about Mrs. Brainard's accounts. How about page 137?

A. I never examined this before. It looks like his writing.

Q. Pages 137 to 155, both inclusive, whose are they?

A. They look like Mr. Brainard's handwriting. His hand changed

a little after he was taken sick. This part here on pages 119, 120, 166, and 169, I should think was Mrs. Brainard's writing.

Q. Whose handwriting are pages 260 and 261?

A. I should say Mr. Brainard's.

Q. And 262 and 263?

A. 262 and 263 I should say were in Mr. Brainard's writing.

Q. 264?

A. That looks like Mrs. Brainard's.

Q. Now turn back to pages 2, 3, 4, and 5. Have you examined that account?

A. Yes.

Q. State whether or not that is a correct account of the transactions between you and Mr. Brainard.

A. Mr. Brainard gave me a copy of this account, which I have compared with it, and they agree.

Q. And that is a correct account?

A. Yes.

Q. State whether the copy he gave you is the statement which you have previously referred to in your testimony as being in your possession.

A. Yes.

Q. Now state whether or not you sent to Mr. Brainard for investment the various sums of money that are entered in that account in the book and at about the dates at which they are respectively entered.

A. I did not keep an account of the money I sent to him. He gave me a statement of the account copied from the book,
32 which I have since compared and found to be the same as in the book as to all the amounts that I had sent to him and he acknowledged as having received from me.

Q. How is it, according to your recollection, about being correct or otherwise?

A. As I had not *ny* account and did not keep any account of it, I have not sufficient recollection to say, except that I had perfect confidence in him and just left the matter with him entirely. I never had any reason to suppose that it was not a correct statement of the account.

Q. After the death of Mr. Brainard what further transactions did you have with Mrs. Brainard with reference to the house?

(Objected to by Mr. Simmons as irrelevant, incompetent, and inadmissable.)

A. I sent $2,000 to her in the form of a certificate of deposit in the American Exchange National Bank of New York to finish up paying for the house.

Q. How did you come to send that money to her?

A. She agreed to deed the house to me.

Q. What did she say with reference to the amount that was due on it?

A. Well, I do not remember. I know that it was so near $2,000 that I sent the $2,000.

Q. What was it that came to nearly $2,000?
A. The balance on the house.
Q. Was there a mortgage on the house that you paid off?
A. I did not have anything to do with that. I sent the money to pay for the house.
Q. And that paid the mortgage?
A. I had nothing to do about it, except to send the money to pay it.
Q. (Showing witness a paper already marked Ex. "C," and which is now further marked for identification Ex. No. 2, A. J., examiner, December 10, '98.) Look at that paper and state what it is.
A. That is the certificate of deposit in the American Exchange national bank which I sent to Mrs. Brainard to pay the balance on the house.
Q. Just give the date and the amount of it.
A. "L. L. Buck has deposited in the American Exchange national bank two thousand dollars, payable to the order of himself on return of this certificate properly endorsed." The date is March 17, 1882.
Q. Now, look at the endorsements and state whether you know the handwriting of the two upper endorsements.
A. The upper endorsement is in my handwriting, and the second one is Mrs. Brainard's. The writing under that I do not know.

Mr. ROBINSON: I offer the book and the certificate of deposit in evidence.
Mr. SIMMONS: I object to both as being irrelevant, incompetent, and immaterial.
Said book, marked as Exhibit No. 1, and said certificate of deposit, marked Exhibit No. 2, are filed herewith.
33 Mr. ROBINSON: There are some papers attached to the certificate of deposit.
Mr. SIMMONS: I admit the signature of W. W. Wetzel and the whole writing of that paper, so far as I know, to be that of the secretary of the Western Building Association of Washington.
Said paper referred to is marked by the examiner Exhibit No. 3, December 10, 1898, it being the paper attached to the certificate of deposit.

By Mr. ROBINSON:

Q. I show you this paper that has just been marked as Exhibit No. 3. How did that come into your possession?
A. I do not know, unless it was among the papers that were sent to me after Mr. Brainard's death.
Q. Is that your recollection about it?
A. I do not remember anything about it.
Q. Page 5 of Exhibit 1 shows a balance, June 8, 1890, of $793.58. State whether or not any part of that has ever been repaid to you.
A. No.
Q. State whether or not any part of the moneys with which Mr.

Brainard charged himself in this account have ever been repaid to you except as stated in the account.

A. No; I understood that I had completed the payment for the house, and that when Mrs. Brainard gave me the deed of the property I considered it to be my house and had no further question about it.

Q. You considered that you had paid all the purchase-money?

A. Yes; if I had had any question about it I should not have gone on paying taxes, water rents, insurance, repairs, and improvements.

Q. Which you have done from the time you took it?

A. Which I have done since Mrs. Brainard's death.

Q. After the death of Mr. Brainard did you have any conversation with Mrs. Brainard in reference to the title of the house?

(Question objected to by Mr. Simmons as being irrelevant and incompetent.)

Q. About the ownership of the house, did she say anything to you about that?

(Objected to by Mr. Simmons as being incompetent.)

A. She deeded the house to me, and she could not have said anything about the ownership as long as she considered that she owned it.

Q. Did she say anything about it?

A. Not that I know of.

Mr. SIMMONS: I agree that the written statement which Mr. Buck has referred to as being copied from the book and delivered to him by Mr. Brainard in his lifetime may be offered in evidence as if he had it here present, subject to the objection that it is irrelevant and incompetent, and subject, further, to the right to show that it is not in the handwriting of Mr. Brainard—in contradiction of Mr. Buck's statement that it is—if I desire to do so. I
34 want to add the further reservation that it must show itself to be a correct copy from this book Exhibit No. 1.

By Mr. ROBINSON:

Q. Paragraph 12 of the amended bill of complaint states this: "The plaintiffs further show that not until after the said action at law, No. 41274, which is the suit of said William H. Brainard against James Coleman, had been brought had the plaintiff Leffert L. Buck any information that the legal title to said premises did not pass to his sister, the said Cornelia A. Brainard, under the will of her said husband, Charles F. Brainard." What do you say with reference to that?

A. I had no idea that it did not pass to Mrs. Brainard.

Q. Did you think it did?

A. I thought it did; certainly.

(Objected to by Mr. Simmons as being irrelevant.)

Cross-examination.

By Mr. SIMMONS:

Q. Mr. Buck, when you began sending this money to Mr. Brainard, in 1875, it was understood that he was to pay you interest upon the money, was it not?

A. It was understood that he was to invest it for me.

Q. In interest-paying securities?

A. Yes.

Q. Did he ever pay you any interest?

A. No.

Q. You knew at the time he took the deed for the house that he did not pay all cash, did you not?

A. I understood that he had not.

Q. You knew that he had to give a mortgage for part of the purchase-money?

A. I did not know what he gave. I knew that it was not all paid, and I supposed he had secured what was not paid.

Q. And so you spoke about it in 1880, before he died?

A. Yes.

Q. And he said he would settle up with you when he got well?

A. He did not say he would settle up. He said he would like to keep the property in his own name, and if he recovered he would like to pay for it, and pay me for my share.

Q. You agreed to that, did you?

A. Yes. We were doing anything we could to help him recover his health if possible.

Q. At the time Mrs. Brainard made the deed to you it was understood and agreed that if you paid the $2,000 she would make the deed?

A. If I finished paying for the house she would deed the property to me, which she did.

Q. What time did you say Mr. Brainard visited you in Brooklyn?

A. He visited me several times, but the visit I spoke of was shortly before his death, and it was the last time I ever saw him.

Q. Did he visit you in the June prior to the date of his death?

A. June?

Q. Yes; June or July; some time — the summer of 1880?

A. I could not give you the dates. I could if I had my diary here that I kept.

35 Q. Did you ever buy any medicine for him and send it on here?

A. Yes; after Mrs. Brainard's death I paid his doctor bills.

By Mr. ROBINSON:

Q. About how much?

A. Mrs. Brainard's and his were together somewhere in the vicinity of $500.

By Mr. SIMMONS:

Q. You did not pay his undertaker's bill?

A. Yes; the receipt for the money that I paid was receipted to the estate of C. F. Brainard, but it was paid by my money. I paid my money, aside from what I had in their hands that belonged to me.

Q. I notice on page 87 of Exhibit No. 1 "Undertaker's bill;" whose handwriting is that?

A. I think that is Mrs. Brainard's handwriting.

Q. Look on page 122 of Exhibit No. 1 and see whose handwriting those items are in.

A. On page 122, I should say that it is in Mr. Brainard's handwriting, and on 123 down as far as the blue ink goes.

Q. Whose is the handwriting in blue ink?

A. I say as far as the blue ink goes I should say is Mr. Brainard's.

Q. I had reference to page 122, not page 123.

A. I am not certain about that.

Q. You are not certain whether any of it is in his handwriting?

A. I think this page 122 is his handwriting, and the three or four lines at the top of page 123 look so much like it that that might be his handwriting.

Q. In whose handwriting are pages 124 and 125?

A. I should think that was Mrs. Brainard's.

Q. And the same, is it, with reference to 126 and 127?

A. I should think so; it would help me a good deal if I had some of her letters here with me, but I did not bring any of them.

Q. Look at pages 128 and 129 and state in whose handwriting that is.

A. I should say that 128 was Mrs. Brainard's.

Q. How about 129?

A. That blue ink I should say was Mr. Brainard's; the dark ink I should say was Mrs. Brainard's.

Q. In whose handwriting is that on the back of page Y?

A. I should think that was Mr. Brainard's.

Redirect examination.

By Mr. ROBINSON:

Q. You stated, I think, in the first part of your direct examination, something about having some correspondence with Mr. Brainard in reference to these matters.

(Objected to by Mr. Simmons as not proper redirect examination.)

A. What matters?

Q. With reference to the proposed purchase of the house. Have you those letters?

A. No.

Q. Have you made search for them?

A. Yes.

36 Q. Have you been able to find them?

A. No; not so far.

Q. After Mr. Brainard's death, state what Mrs. Brainard's occupation was. How did she support herself?

(Objected to by Mr. Simmons as irrelevant.)

A. She supported herself, so far as she could, by taking boarders.
Q. Did she support herself in full?
A. Not entirely. I gave her what money I could spare.
Q. At what periods?
A. At various periods. Every time I came down here I would give her some, and when she wrote to me that she was short and needed some I would send her money.
Q. How often were you here?
A. It depended on the time; sometimes there would several years pass, perhaps, before I came here; at other times I was here quite frequently, especially during Mr. Brainard's sickness.
Q. I am speaking of the time after his death.
A. I was here quite frequently after I became a member of the Intercontinental Railroad Commission.
Q. Can you say about when that was?
A. I think it began about 1891 or 1892. I cannot give you the exact date now.

(It was agreed by and between counsel on both sides that the witness may hereafter refresh his recollection from writings in his possession and send the exact date to the examiner, who is to insert the same at this point. Subsequently the witness informed the examiner in writing that the date was.)

Q. She died in 1892. During the period between Mr. Brainard's death, in 1881, and her death, in 1892, how frequently were you here?
A. I was not here very frequently before 1890. She was alive when on that Intercontinental Railroad Commission—at the first of it.

Complainants' counsel offered in evidence the following-described papers, which are filed herewith, marked respectively as indicated:

Deed from Cornelia A. Brainard to Leffert L. Buck of the premises in question, dated March 31, 1882, acknowledged March 31, 1882; not recorded. Marked by the examiner Exhibit No. 4, and objected to by defendants' counsel as incompetent and irrelevant.

Complainants' counsel also offer in evidence deed from Caroline B. Farrar to Leffert L. Buck, dated 7th March, 1898, and acknowledged 7th March, 1898.

Marked by the examiner as Exhibit No. 5.

Also deed from Frances A. Peck and David B. Peck, her husband, to Leffert L. Buck, dated 7th March, 1898, and acknowledged 7th March, 1898.

Marked by the examiner Exhibit No. 6.

Also deed from Mary Brainard Day and Alfred Day, her husband, to Leffert L. Buck, dated 28th March, and acknowledged 28th March, 1898.

Marked by the examiner Exhibit No. 7.

Also paper attached to the bill of complaint, being copy of the last will and testament of Charles F. Brainard, dated June
37 12, 1872, and recorded in Wili Book No. 19 of the District of Columbia, at folio 222.

All of said last-mentioned papers objected to.

Recross-examination.

By Mr. SIMMONS:

Q. I wish you would look at the letter accompanying the deposition of Caroline B. Farrar, dated February 12, 1898, and addressed to Mrs. Caroline B. Farrar at 83 Halsey St., Cleveland, Ohio, and purporting to be signed by you, and state whether or not you sent her that letter.

A. (After reading the letter.) Yes.

The said letter is already marked as "Exhibit A to the testimony of Mrs. Caroline B. Farrar, November 26, 1898, Albert V Taylor, examiner and special commissioner," and it is now marked by the examiner for further identification as "Exhibit No. 8, December 10, 1898, A. J., examiner."

Q. Can you tell what amount of rent you collected from this house from the time you took possession after Mrs. Brainard's death, up to the time of the bringing of this suit?

A. No, I cannot now.

Q. Do you know how much you collected per month?

A. I think there were two years after Mrs. Brainard's death before I rented the house at all, and during that time I hired a person to stay and take care of it. When it was rented my impression is that it was rented at $65 a month.

EXHIBIT No. 2.

EXHIBIT "C."

Filed April 15, 1898.

13951. NEW YORK, *M'ch* 17, 1882.

L. L. Buck has deposited in the American Exchange national bank two thousand —— doll's, payable to the order of himself —— on return of this certificate properly endorsed.

$2,000. JNO. S. CARR, *Teller.*

E. BURNS, JR., *Cashier.*

[Written across the face:] Paid. Am. Exch'ge nat. bank, New York.

Endorsed: Payable to the order of Mrs. C. A. Brainard. L. L. Buck. Mrs. C. A. Brainard. W. G. Duckett, treas. West. B. Ass'n. (Stamp.) Riggs & Co. Two thousand dollars.

Mr. L. L. Buck.

Mar. 14, '82, $2,000 sent to Washington to Mrs. C. A. Brainard. On Mar. 16, '82, rec'd, ack'd without stating the am't.

38 EXHIBIT No. "3."

Filed April 15, 1898.

MARCH 17, 1882.

Dr. W. G. Duckett, treas. Western Building Ass'n.

DEAR SIR: On receipt of the following amounts from Mrs. C. A. Brainard or her representative, viz:

| | |
|---|---|
| In settlement of 17 shares | 1,966.56 |
| For expenses of release deed | 5.00 |
| " " in recording deed of release | 1.25 |
| Total to collect | $1,972.81 |

the accompanying release deed may be filed for record and the other papers turned over to Mrs. B.

Respectfully, &c.,

W. N. WETZEL,
*Sec'y W. B. Ass'n.*

*2,000
1,972.81

$27.19 due Mrs. Brainard.
.68

$26.51

*Deposition of William H. Brainard, Defendant.*

Filed April 22, 1899.

WILLIAM H. BRAINARD, a witness of lawful age, being by me first duly sworn according to law for and on behalf of the respondents, testified as follows:

By Mr. SIMMONS:

Q. Mr. Brainard, state your full name, your age, your residence, and your occupation.

A. William H. Brainard. My residence is Galesburg, Illinois. My age is 58; occupation, life insurance.

Q. What relation, if any, were you to the late Charles F. Brainard?

A. He was my brother.

Q. When did he first come to Washington to reside?

A. In 1864.

Q. When did you first live in Washington, if at any time?

A. In 1869 or about that time. I cannot tell you the date. It was at the time of the impeachment trial of Andrew Johnson. I think that was in 1869.

[*In pencil in copy.]

Q. Do you know when he was first employed in the Treasury Department?

A. It was in 1864.

39 Q. Do you know what salary he received?

A. Yes, sir; $1,200.

Q. Do you know whether or not he was promoted, if at any time?

A. Yes, sir; he was promoted three times.

Q. Just state when he was promoted and salary he drew on each promotion.

A. In 1865 he was promoted to $1,400.00, in 1866 to $1,600.00, and in 1867 to $1,800.00. The salary that he then received he always drew after that until his death.

Q. Do you know if he owned any property, outside of his furniture and personal effects, at the time that you boarded with him?

A. Why, I know that he owned some bonds and had some money interests out West, in St. Paul. He loaned money to a man out there by the name of Amost Wilder, of St. Paul, Minnesota. He was a friend of the family's and he invested for him where he was getting ten per cent. a year for the money.

Q. What time was this when he owned these bonds?

A. Why, it was along in the seventies—seventy-four or seventy-five, along in there—seventy-three.

Q. Were they bonds amounting to large amounts or small amounts?

A. Well, they were—the way that I know that they were small amounts—they were running along—he used to lay up his money until he could get one hundred or two hundred dollars, so as to get a one-hundred or two-hundred dollar bond, and then he would put that money into the bond.

Q. Did you say that he had money invested with Mr. Wilder out West?

A. Yes, sir.

Q. About what time was that?

A. That was along in the seventies—seventy-four, I think—for I know that I saw where Mr. Wilder had sent the interest at different times—one hundred dollars, one hundred dollars interest money.

Q. Do you know how much money he had out there?

A. No, sir; I do not. It was not less than $1,000.00; perhaps more than —. I cannot tell.

Q. How much interest did you say you saw at one time?

A. I saw it several times, but the amount of interest that he got was $100.00.

Q. Did you ever hear him say anything in relation to purchasing a home?

A. Yes, sir.

Q. At what time was it when you heard him speak about purchasing a home?

A. It was in seventy-six or seventy-seven.

Q. Do you know what time he purchased that house?

A. In 1879.

Q. Do you know what month it was?

A. No, sir; I do not.

Q. Did you ever hear him speak of a house *of* 1632 Rhode Island avenue in relation to the ownership?

A. Often; he spoke of it as his own house.

Mr. BURKHART: I object to all the answers which show or have any tendency to show conversations with Charles F. Brainard as being incompetent, irrelevant, and immaterial, and as hearsay.

Q. Did you ever hear him say that any one else had an interest in it?

40 Mr. BURKHART: Objected to as leading and for the same reasons before stated.

A. No, sir.

Q. Do you know Mr. Brainard—whether or not he had any money invested in any building association?

A. Yes, sir; I know that he had it in several.

Q. Do you know the names of any of them?

A. No, sir; I do not know that I can recall any of the names. I know that we both had one in one, and it was that Thomas L. Tulloch was connected with. We both drew out of that before the building association went into the hands of a receiver.

Q. Do you know what time it was that this association failed, as near as you can state it, to the best of your recollection?

A. I think it was in 1871 or 1872.

Q. Mr. Brainard, did you or not know of your brother ever losing any money in a building association?

A. I never heard of his losing any money in it; no, sir; no, sir; I did not know that he ever did.

Q. How often did you visit him after he moved to the house on Rhode Island avenue?

A. Why, quite often. We always on holidays. Our families would either take dinner at one place or the other. Sometimes oftener; sometimes not so often. He lived in one part of the city, and I lived in the other.

Mr. BURKHART: Same objection as immaterial, irrelevant, and incompetent, and to ask to strike it out.

Q. Were you at his house at the time of his death?

A. Yes, sir.

Q. What property, if any, did your brother have in the way of household furniture and effects at his death?

A. He had a piano, he had silverware, he had a gold watch and chain and furniture that always goes with a house, carpets, and everything necessary for a first-class house.

Q. What would — consider the value of that furniture and effects?

A. From $1,500.00 to $2,000.00.

Q. You say your brother was employed from 1884 to the date of his death in the Treasury Department?

A. Yes, sir.

Q. What kind of a man was your brother; was he a man known as a careful, quiet, retentious man, or was he a saving man, or was he extravagant and careless?

A. He was a very careful and saving man.

Q. What members did his family consist of?

A. Himself and wife.

Q. Do you know what property he left at his death in the way of moneys in bank?

A. He had about a thousand dollars in the bank at the time of his death.

Q. How do you know that?

A. Mrs. Brainard, his wife, came to me and wished me to sign a paper so that she could draw the money.

41 Whereupon the witness WILLIAM H. BRAINARD was cross-examined—

By Mr. BURKART:

Q. When did you first come to Washington, Mr. Brainard, the first time?

A. It was in 1869, I think it was.

Q. You spoke yesterday of some bonds that Mr. Charles F. Brainard owned.

A. Yes, sir.

Q. How many bonds did he have, if any?

A. Well, I could not tell. He was buying them at odd times. He bought 3.65 bonds, District of Columbia bonds, and he bought four per cent. United States bonds. He would buy them at different times. How much he bought I do not know.

Q. I want to know the amount of his holdings in bonds, the amount that he purchased.

A. Well, I think it was in the neighborhood of three or four thousand dollars.

Q. How do you know that he purchased these bonds?

A. Because we had conversations several times about it, and he got me at the same time to lay by a little and put it into bonds.

Q. When did you have these conversations or any of them?

A. In 1870 or 1871.

Q. Where, if you remember?

A. Yes, sir. At his house on New Jersey avenue.

Q. Do you know anything about it except what Mr. Brainard told you?

A. No, sir; I do not.

Q. All you know about his holding the bonds was the knowledge you got from him?

A. Yes, sir.

Q. Where did he get the money to buy these bonds with?

A. He got it from his salary.

Q. What salary was he drawing then?

A. Well, he was drawing eighteen hundred dollars then.

Q. How do you know that Mr. Brainard got it from his salary—the money that he bought these bonds with?

A. I only told you what Mr. Brainard told me—that he laid aside a part of it and when he got from fifty dollars to one hundred dollars or two hundred dollars he would get a bond.

Q. Do you know what he did with these bonds?

A. He kept them in the Treasury Department, he told me.

Q. Do you know whether he ever sold them?

A. I suppose he did.

Q. Do you know whether he did?

A. No, sir; I do not.

Q. So that all your testimony about these bonds is based upon what Mr. Brainard told you in conversations?

A. Yes, sir.

Q. Now, what money did Mr. Brainard have, if any, on interest in the West?

A. He had not less than one thousand dollars.

Q. How do you know that?

A. Because the man he had it loaned to was a particular friend of the family.

Q. From whom did you learn that he had a thousand dollars loaned?

A. From Mr. Brainard himself. He told me that he had this money at interest and he showed me the interest money
42 several times, two or three different times, which he had received; it was one hundred dollars.

Q. When?

A. When he received a draft from the West.

Q. From where?

A. St. Paul.

Q. Where did he show you these drafts?

A. At his house.

Q. How do you know that these drafts were in payment of interest on any money loaned?

A. Because he said so.

Q. Do you know whether this money he had invested in the West was his money or some one's else?

A. He said it was his.

Q. All the knowledge that you have of that matter is what he told you in his lifetime?

A. Yes, sir; certainly.

Q. What building association did Mr. Brainard have money in, if any?

A. He had it in several—I do not remember the names of the building associations—that I do not know.

Q. Do you remember the names of any of them?

A. No, sir; I do not.

Q. Do you know how much money he had in any of them?

A. No, sir.

Q. Do you know that he had any money in any of them?
A. He said he did. I do not know that he had any.
Q. What you know about that is only what he told you?
A. Except the one that we both had money in, and that was the one that Thomas L. Tulloch was president of.
Q. How do you know that?
A. Because we both paid it in at the same time.
Q. How much did you pay in?
A. Twenty-five dollars.
Q. How much did he?
A. I do not know.
Q. Did you ever see him pay in any?
A. Yes, sir.
Q. How much did he pay in?
A. I did not pay any attention to the amount of it.
Q. When did he ever make any payments to that building association?
A. Every month.
Q. What year and what month?
A. In 1871 and 1872.
Q. Where did he make these payments?
A. They had their office down at the corner of Eighth and F streets.
Q. Did you ever make any of these payments for him?
A. No, sir.
Q. You do not know, then, that he had money in any building association except this one, except for the statements that he made to you in his lifetime?
A. That is all.
Q. And you do not know how much he had in these building associations?
A. No, sir.
Q. Do you know whether he ever drew his money out?
A. Yes, sir; out of that he did.
Q. How do you know that fact?
A. Because he told me so.
Q. That is the only source of information you have?
A. Yes, sir; I drew mine out and he told me he did his.
Q. Do you know how much he drew out?
A. No, sir; I do not.
Q. When did he draw it out?
A. I think it was the latter part of 1872.
Q. When did Mr. Brainard die?
A. He died in 1881.
43 Q. And when did his widow die?
A. In 1892, I think.
Q. Where did both of them die?
A. Well, Mr. Brainard died in 1632 Rhode Island avenue. Where Mrs. Brainard died I do not know; I understood she died there.

Q. Were you present at the time of the death of either one of them?

A. Of my brother I was.

Q. Were you present at the death of Mrs. Brainard?

A. No, sir. I did not know she was dead until several years after she had died.

Q. You stated yesterday that Mr. Buck, after Mrs. Brainard's death, took the household furniture and effects of Mrs. Brainard.

A. Yes, sir.

Q. Why did you and the other heirs allow him to take that household furniture and effects, if you claimed that *you* belonged to you?

A. I did not know anything about it until a long time afterwards.

Q. How long a while?

A. A year or two, I guess.

Q. Can you make it any more definite than that; was it one or two?

A. It might have been one or it might have been two; I could not make it more definite, because I do not know.

Q. You ought to be able to tell more definitely in a matter of that importance.

A. Well, I cannot.

Q. Did you ever make any demand on Mr. Buck for it?

A. No, sir.

Q. You never mentioned it to him at all?

A. No, sir.

Q. You learned that he had taken this furniture. After you had learned that he had taken this furniture and these effects, why did you not make a demand on him for it?

A. Well, I supposed that all personal property belonged to the widow, to do with as she pleased.

Q. Well, what caused you to suppose that?

A. I do not know. I merely understood that that was the case.

Q. Well, who gave you to understand that?

A. No lawyer here in this town. I was talking with a lawyer in Galesburg, not bringing up this particular case, but other cases.

Q. Who was it?

Mr. SIMMONS: I object to that. It makes no difference who told him.

Mr. BURKHART: Yes, sir; it does. I want to get at this, and I have all the right possible to test the witness's recollection and knowledge.

A. Well, if you would like me to tell I will tell you. George Candy Gale, of the firm of Arnold and Gale.

Q. And he told you that all personal property in the District of Columbia belonging to the husband went to the widow?

A. I did not say any such thing.

Q. Well, what did he tell you?

A. I did not ask him anything about the District of Columbia.

Q. What did he tell you?

A. I understood him to say that all the personal property belonged to the widow.

44 Q. Did you ever make any inquiry with reference to the law of the District of Columbia in that regard?

A. No, sir; I never did.

Q. Did any of the other of Mr. Brainard's heirs ever make any inquiry?

A. Not that I know of.

Q. When did you become acquainted with Mr. Buck?

A. I think it was in about 1869.

Q. Where?

A. The first time I ever saw Mr. Buck to know him was at my brother's house on New Jersey avenue; he was there visiting.

Q. Mr. Buck was your brother's brother-in-law, was he not?

A. Yes, sir.

Q. You stated yesterday that Mr. Buck's sources of income were from his salary and from his *salary and from his* profession. What salary do you know that he ever drew?

A. I do not know anything about his salaries. The only thing that I know is I never heard of his having any income excepting from what he derived from his profession.

Q. Where did you ever hear that he had any income from his profession?

A. I never heard it. Only what I supposed, of course.

Q. That is entirely a supposition on your part?

A. Yes, sir.

Q. You do not know, as a matter of fact, what income he has?

A. No, sir; I do not know whether he had a dollar or not.

Q. And you do not know the extent of it?

A. No, sir.

Q. How often did you meet Mr. Buck in Mr. Brainard's house in Washington?

A. I never met him there but once.

Q. When was that?

A. That was the time I am speaking of in 1869.

Q. Did you ever see Mr. Buck after that?

A. Yes, sir.

Q. When and where?

A. I saw him in 1881, at the time of my brother's death.

Q. Where?

A. At 1632 Rhode Island avenue.

Q. At either of those times that you saw Mr. Buck did you say anything to him or he to you of this house, 1632 Rhode Island avenue?

A. No, sir.

Q. Now, you said something yesterday about one thousand dollars in bank to the credit of Mr. Brainard at the time of his death.

A. It was the National savings bank.

Q. In what city?

A. Washington city, corner Fifteenth and New York avenue.

Q. How do you know that there was a thousand dollars there?

A. Mrs. Brainard came to me and wished me to sign a paper that she had already had signed by my two sisters, allowing her to draw his money from the bank, as she stated that she wanted to make a payment upon the house, applying this money that she should draw from the bank to apply it to the liquidation of the debt on the house.

Q. And all you know about that is what Mrs. Brainard told you?

A. Yes, sir.

Q. Do you know whose money that was?

A. I know it was in my brother's name.

Q. Do you know whose money it was?

A. No, sir.

45 Q. You do not know?

A. No, sir.

Q. Do you know where your brother got the money?

A. Why, certainly not.

Q. Do you know in whose name the money was deposited?

A. Charles F. Brainard.

Q. Individually or as agent?

A. Individually.

Q. How do you know that?

A. Because I saw it. I went up and looked over his accounts.

Q. Where?

A. At the bank.

Q. When?

A. A few days ago.

Q. Since you have been in town this time?

A. Yes, sir.

Q. Do you know what became of that money?

A. No, sir.

Q. Who took possession of that property after Mr. Brainard's death?

A. Mrs. Brainard.

Q. How long did she remain in possession?

A. Until the time of her death.

Q. When was that?

A. In 1892.

Q. And who took possession after her death?

A. I think Mr. Buck did.

Q. Do you know anything about that?

A. No, sir.

Q. When did you know that Mr. Buck had possession or when did you learn that Mr. Buck took possession of this property?

A. Oh, I think it is about 1893 or 1894; along in there somewheres; I do not know exactly.

Q. That was when you first learned that he took possession of this property?

A. Yes, sir.

Q. What, if anything, did you say to him at that time when you got this information?

A. I did not say anything at all.

Q. Did you have any communication with him with reference to the property?

A. No, sir.

Q. How did you learn that Mr. Buck was in possession of that property?

A. A friend of mine informed me.

Q. Who was he?

Mr. SIMMONS: I object to the question as immaterial, irrelevant, and incompetent, and I instruct the witness he does not need to answer.

A. Well, I will say this, as far as I am concerned, if you think it is any lawyer in this town who informed me, it is not.

Q. How long after Mrs. Brainard's death was it that you had learned that Mr. Buck had taken possession of this property?

A. About two years—in that neighborhood.

Q. Why did you and the other relatives of Mr. Charles F. Brainard allow Mr. Buck to take possession of this property after Mrs. Brainard's death?

A. In the first place, I do not think they knew anything about it.

Q Is that all you wish to say in answer to that question?

A. Yes, sir.

Mr. SIMMONS: I object to the question as immaterial, irrel-
46 evant, and incompetent, and further that that matter was not gone into in the examination-in-chief.

A. I do not think that there is any answer.

Q. Do you refuse to answer? I wish you to state why you allowed that time to elapse before taking these steps to recover the possession.

A Simply because my attention was not called to it one way or the other until some time afterwards.

Q. Some time after what?

A. Just before that I made the claim.

Q. Were you, as stated, that you learned a year or two after Mrs. Brainard that Mr. Buck had taken possession of the property?

A. Yes, sir.

Q. That would make it 1893 or 1894. You took no steps to recover the property until 1897? My question is why you allowed that elapse of years or more before you took steps to recover the property?

—. ——.

Q. Do you know whether or not your brother ever made a will in his lifetime?

A. No, sir; I do not know anything about it.

Q. You do not know whether he left a will or not?

A. No, sir.

Q. You were quite intimate with your brother, were you not, while you lived here together in the city?

A. Yes, sir.

Q. Is it not probable if he had made a will, he would — told you something about it?

A. Why, he might and he might not. I have heard him say often that every man ought to make a will.

Q. Did you ever hear him say that he had made one?

A. No, sir.

Q. Did you ever understand that he had made one?

A. No, sir; only that he said that every man ought to make a will.

Q. Do you know now that he did make a will?

A. Yes, sir.

Q. How did you ascertain it?

A. By seeing it.

Q. When and where?

A. I saw a copy of it, rather. I do not know as I saw the will; I saw a copy.

Q. When and where did you see the copy?

A. Oh, I think it was within a week.

Q. Is — the first intimation that you ever had that Mr. Brainard left a will?

A. No, sir.

Q. Do you know how much money he had in the West?

A. It was not less than one thousand dollars and it might have been more.

Q. How do you know that?

A. Because he told me.

Q. Do you know what the first payment was that he made on the house?

A. I think it was in the neighborhood of between two and three thousand dollars that he told me.

Q. And he made that first payment from the money that he drew in from the West?

A. I did not say so. I said that was part of the money.

Q. Where did he get the other money?

A. I suppose that he got it from his salary.

Q. I do not want your supposition. I want to know.

A. I do not know.

47 Q. You did not pay any money on that property, did you?

A. No, sir.

Q. Now, you testified yesterday that in some year Mr. Brainard told you that he was going to buy a house?

A. Yes, sir; as soon as he could find one that suited him.

Q. Where did this conversation between you and him take place?

A. Several different times. He told me at his own home at New Jersey avenue first, and I met him on the street a good many times and he said he was looking around for a house and as soon as he could find — that suited him he should buy it. He said that he could draw in his money. He had notified Mr. Wilder and he could draw his money at any time that he wanted it.

Q. When was this?

A. The first conversation that I had with him was along in 1875,

I think it was, or 1876, about the buying of the house; along in there some time; I could not tell you the year.

Q. When did he talk with you again about it?

A. Off and on, different times, he talked with me about it. I do not know but what it was a month or two before he bought the house.

Q. When was that?

A. That was in 1869.

Q. No, sir; it was not.

Mr. SIMMONS: Seventy-nine.

A. Seventy-nine, I should say.

Q. Do you know whether or not Mr. Brainard had any money in his hands during the seventies and up to the time of his death belonging to Mr. Buck for investment or for any other purpose?

A. No, sir; I never heard of it.

Q. You do not know anything about it?

A. I never heard of it.

Q. Do you know anything about Mr. Brainard's property, what he had, either real or personal, and what debts he had or what money he had, except what he told you?

A. No, sir.

Q. Do you know what business he was engaged in, outside of what he told you?

A. I knew that he was in the Treasury Department, because I have seen him there.

Q. Well, outside of that; I did not mean employment there.

A. No, sir; certainly not.

Q. Do you know what income he had, outside of what he told you?

A. No, sir.

Q. Then you do not know anything at all about this case except what your brother told you?

A. No, sir; that is all I know.

WILLIAM H. BRAINARD.

THOMAS G. JONES, a witness of lawful age, being by me first duly sworn according to law for and on behalf of the respondents, testified as follows:

By Mr. SIMMONS:

Q. State your name and occupation.

A. Thomas G. Jones; clerk in the Treasury Department.

Q. How long have you been employed there?

A. Since September, 1861.

48 Q. Were you acquainted with Mr. Charles F. Brainard?

A. Yes, sir.

Q. Have you examined the records or have you charge of the records showing what days he was absent or present at that office?

A. I have not the custody of that record now. I am not keeping the time at this present day; but I did at that time and some time before that date you mentioned, and subsequently to it.

Q. What does your record show as to whether or not he was present or absent during the month of July, 1879?

Mr. BURKHART: The question is objected to because the record is in writing and speaks for itself and is the best evidence and should be produced.

A. The record of the law division of the Secretary's office of the Treasury Department when he was employed there is that he was present during the month of July, 1879.

Q. During the entire month of July he was present as your record shows on it?

Mr. BURKART: Same objection to the question.

A. Yes, sir.

Q. By that do I understand you to mean each day of the month or each business day?

A. Each business day—not Sundays and not fourth of July, which was a holiday.

Q. Have you any special knowledge of those records, the keeping of those records, or I might ask you did you or did you not make those records yourself—make those records?

A. I made those entries myself from my personal knowledge as to whether they were there of not. If they were not there, it was my duty to inquire whether they were coming that day or not or whether they had been in and I had missed them.

FRANCIS P. MADERIA, a witness of lawful age, being by me first duly sworn according to law for and on behalf of the defendants, testified as follows:

By Mr. SIMMONS:

Q. State your name, age, residence, and occupation.

A. Francis P. Maderia; age, 25; residence, 1511 Thirteenth — northwest; occupation, book-keeper.

Q. Who are you book-keeper for—who are you employed by, if any one?

A. Thomas J. Fisher and Company.

Q. Mr. Maderia, look at the book I now hand you, marked Complainants' Exhibit A, on pages two, three, four, and five.

A. Yes, sir.

Q. Assuming that this book was the property of Charles F. Brainard during his lifetime, and that it was found among his effects after his death, and that it was account between himself and the complainant in this case, L. F. Buck, who would you say received the amounts charged in page two from the ordinary and usual form of book-keeping?

49 Mr. BURKHART: The question is objected to as incompetent, irrelevant, and immaterial, and calls for an opinion as an expert witness on a question that is not subject to expert testimony, and that this witness is no more competent to pass such an opinion than the court or any one else, and the book has not been shown to

have been kept in the ordinary and usual form of book-keeping, but may have been kept in a form peculiar to Mr. Brainard himself.

A. I should say that the entries on page two show that the money had been received by Mr. Buck.

Q. Now, on page 4 of that same book, what say you as to that?

Mr. BURKHART: The same objection.

A. The same answer as to page 2, that Mr. Buck has received the money.

Mr. BURKHART: Enter the same objection as above stated.

Q. And what say you as to the credit, pages three and five?

Mr. BURKHART: Same objection.

A. That the money has been received by Mr. Brainard from Mr. Buck.

Q. And those were credits given Mr. Buck?

A. Yes, sir.

Q. You may state, for the purpose of satisfying these gentlemen, what experience you have had in book-keeping.

A. Well, for the last seven years I have had complete charge of all accounts of Thomas J. Fisher and Company.

Cross-examination.

By Mr. BURKHART:

Q. There are different styles of book-keeping, are there not?

A. Well, I do not know that there are now. When I went to school we were taught different styles of book-keeping.

Q. And some persons are liable to have systems of their own, are they not?

A. Very true.

Q. Can you state positively that the book-keeping there is or is not in the regularly taught form or style?

A. Yes, sir. It is the style that has been followed in our office for the last twenty years. This book is kept exactly as my ledgers are kept today.

FRANCIS P. MADERIA.

EDWIN B. HAY, a witness of lawful age, being by me first duly sworn according to law for and on behalf of the defendants, testified as follows:

By Mr. SIMMONS:

Q. Will you state what experience you have had, if any, in book-keeping?

A. I have been a teacher of the subject in its various branches for 32 years, and have given instructions to many of the expert
50 accountants and book-keepers employed in the District of Columbia and elsewhere.

Q. I hand you a book, which is marked "Complainants' Exhibit

A," and ask you to look at pages 2, 3, 4, and 5. You will notice on the fly-leaf of that book that it is marked "C. F. Brainard, private, July 6, 1879." Assuming that Mr. Brainard died some time in 1881, and that this book I have handed you was the property of Mr. Brainard, and that it was found among his effects after his death, and that the account on pages 2, 3, 4, and 5 was between himself and the complainant in this case, L. L. Buck, who would you say received the amount charged on page 2, from the ordinary and usual course of book-keeping—Mr. Brainard or Mr. Buck?

Mr. BURKHART: The question is objected to as incompetent, irrelevant, and as calling for an opinion as an expert witness on the question that is not subject to expert testimony, and that this witness is no more competent to pass such an opinion than the court or any one else, and the book is not shown to have been kept in the ordinary and usual form of book-keeping, but may have been kept in a form peculiar to Mr. Brainard himself.

A. Mr. Buck.

Q. Look at page 4 of the book and state what answer you have to make as to that.

Mr. BURKHART: Same objection.

A. Mr. Buck.

Cross-examination.

By Mr. BURKHART:

Q. How about pages 3 and 5, Mr. Hay, what do they represent, and who either paid or received the money therein stated?

A. In accordance with the rules of book-keeping upon which we are deciding these questions, the debit side shows that Mr. Buck received that money, and undoubtedly the credit side would show that those are the proper credits that were given to Mr. Brainard, he being the one keeping this book. I know nothing whatever of the transaction, but I should judge from that that these purchases and so on set forth there are certain credits given to Mr. Buck; but that the debit side, in accordance with all rules of book-keeping, shows that all these amounts were paid to Mr. Buck.

Q. Well, now, look at this item on page 3, December 28th, "By paid L. L. Buck, cash, $40." What do you say as to that; did Mr. Buck receive that or did Mr. Brainard?

A. I cannot say. It says that "By paid L. L. Buck, cash," and evidently, if you are going to consider this as a matter of record, you must consider also that Mr. Brainard received $40 cash.

Q. You say that Mr. Buck received it from Mr. Brainard?

A. I cannot say as to that.

Q. That is an account between the two, and, assuming it
51 was an account between the two, he received $40 from Mr. Brainard?

A. This is in Mr. Brainard's handwriting, I understand.

Q. Then that page 3 is mixed in itself, according to your testi-

mony. Part of it seems to show that Mr. Brainard is entitled to certain credits, and that that represents money paid Mr. Brainard, and that one item that I have called your attention to represents money paid to Mr. Buck, so that if your opinion of that page is correct there are both debits and credits on that one page, are there not?

A. No, sir; I am not supposed to argue the point of what really is before the court. The item itself says, "By paid L. L. Buck, cash," and in itself it might mean what it says, but the book itself in accordance with the rules of book-keeping would show that that is a credit which would belong to Mr. Buck on account of Mr. Brainard.

Q. Now, turn to page 5, and you will find in there the item, January the 26th, 1880, "By paid L. L. Buck, cash, $20." Now, who would you say received that money?

A. According to the line itself it might be inferred from its that this money was paid to L. L. Buck, yet that entry in cash books on the credit side itself, "To paid by L. L. Buck, cash," would imply that Mr. Buck paid to the party keeping the book that amount of money, and therefore given him credit for the same. But then the intention of Mr. Brainard in this matter I am at a loss to say, but, in accordance with the rules of book-keeping in regard to credits and debits, one side means one thing and the other side means another, and if you are going to accept it in one instance you must accept it in all.

Q. That item that I have just called your attention to shows on its face that Mr. Buck was paid $20.00?

A. It reads so, paid Buck cash, $20. The account itself might also be interpreted in accordance with book-keeping by cash paid L. L. Buck, certifying that cash was paid to Mr. Brainard by L. L. Buck, and that form of record made to indicate the same.

Q. But the words that you used are not in the book.

A. No, sir; I am merely speaking in accordance with the rules of book-keeping. If you accept it in one instance you ought to accept it in another.

Q. There are several ways of keeping books, are there not?

A. Yes, sir; many. A man has his own way of keeping books. There is the single and double entry as the foundation on which all books are kept. Then afterwards it might please a book-keeper to keep his books according to his own ideas. Therefore it is very difficult for a book-keeper to go into an establishment and immediately, without knowing the methods of his predecessor, no matter how familiar he is with book-keeping, and understand the books.

Q. Then that account might have been kept according to the peculiar methods of Mr. Brainard himself.

A. True, but evidently from the appearance of the book and the arrangement of the account, it seems to be kept in accordance with double-entry book-keeping to debit for the receipts and credit for the disbursements. Mr. L. L. Buck's book, if he kept one, would be just the reverse of this. So that all items here appearing upon the credit side upon Mr. Brainard's books would be on the debit side in Mr. Buck's book and *vice versa*.

52 Q. Now, the entry in ordinary book-keeping, as I understand your testimony, would mean that the items on page two represent the money received by Mr. Brainard from Mr. Buck?

Mr. SIMMONS: No; he said received by Mr. Buck from Mr. Brainard.

Q. And those on page three represent the items received by Mr. Brainard from Mr. Buck. Is that the way you interpret this particular book? Can you state positively that that is what this book represents?

A. I am assuming that this is Mr. Brainard's book; that Mr. Brainard kept this account; that Mr. Brainard is a book-keeper; that Mr. Brainard knew what he was doing in accordance with book-keeping, and I have answered accordingly. I am not supposed to know anything of the arrangements or statements of accounts between these individuals. I reiterate, however, all that I have said concerning this account in accordance with the rules of book-keeping; and further than that deponent saith not.

EDWIN B. HAY.

WASHINGTON, D. C., *March* 23, 1899.

Met, pursuant to notice, at the law offices of Leo Simmons, Esq., F street between 13th and 14th streets northwest, to take further testimony for and on behalf of the defendants.

Present: Leo Simmons, Esq., for defendants; Messrs. Coleman and Burkhart, for complainants; examiner, and witness.

Mr. SIMMONS: I offer in evidence a certified copy of a deed from Charles H. Lindsley and wife to Charles F. Brainard, marked Defendants' Exhibit A. A. No. 1.

I also offer in evidence a certified copy of a deed of trust from Charles F. Brainard and wife to John F. Waggaman and John Sherman, marked Defendants' Exhibit A. A. No. 2.

I also offer in evidence the deed of release from John F. Waggaman and John Sherman to Charles F. Brainard and marked Defendants' Exhibit A. A. No. 3.

I also offer in evidence the deed of trust from Charles F. Brainard and wife to John F. Waggaman and James A. Harlan and marked Defendants' Exhibit A. A. No. 4.

I also offer in evidence the deed of release from John F. Waggaman and James A. Harlan, trustees, to Charles F. Brainard and marked Defendants' Exhibit A. A. No. 5.

I also offer in evidence a deed of trust from Charles F. Brainard and wife to Edward S. Wescott and Wilman W. Wetsale, trustees, and marked as Defendants' Exhibit A. A. No. 6.

Mr. BURKHART: I make an objection to all of them as incompetent, irrelevant, and immaterial.

Mr. SIMMONS: And I also offer in evidence a deed of release from Edward S. Wescott and Wilman W. Wetsall to Charles F. Brainard and marked as Defendants' Exhibit A. A. 7.

Mr. SIMMONS: All of the foregoing deeds have reference to conveying the property described in the bill.

53 JAMES COLEMAN, a witness of lawful age, being by me first duly sworn according to law for and on behalf of the defendants, testified as follows:

By Mr. SIMMONS:

Q. Mr. Coleman, you are one of the complainants in this suit?
A. Yes, sir.
Q. Do you remember the premises involved in this litigation?
A. Yes, sir.
Q. When did you take possession of them?
A. My recollection is about the middle of November, 1893.
Q. Have you remained in possession ever since?
A. Yes, sir.
Q. To whom did you pay your rent?
A. Mr. Titcomb, as agent for Mr. Buck.
Q. What amount of rent have you paid since you have been in possession?
A. Until about three years ago I paid $65 a month, but now I pay $60.
Q. Is there any way that you can come nearer to the date when you stopped paying $65?
A. Yes, sir.
Q. Just tell us as near as you can.
A. I cannot without looking at my receipts in my office.
Q. Will you furnish us with that?
A. Yes, sir.

Mr. SIMMONS: For the purpose of rebutting the allegations in the bill as amended, and the proof given by the plaintiff L. L. Buck, but in no way admitting the allegations contained in the original bill, and specifically and especially denying the same to be the fact, I offer in evidence the original bill in this cause.

Mr. BURKHART: We object to your last offer as incompetent and immaterial.

Mr. SIMMONS: I now file with the examiner notice from the attorneys for the complainants, stating that they had closed their testimony received by me about February 15th, and also a letter from the attorney for the complainants asking that they be allowed to place the case upon the calendar for the March term, received February 21, 1899.

Mr. BURKHART: Objected to as being irrelevant, incompetent and immaterial, and having no bearing upon the issues in the case, and they will speak for themselves and reference to them will disclose that they do not say what the attorney for the defendant claims they do.

JAMES COLEMAN.

Subscribed and signed for the witness by me, by consent and agreement of counsel, this 23 day of March, 1899.

MASON N. RICHARDSON, *Examiner.*

Mr. SIMMONS: That closes my case.

MASON N. RICHARDSON, *Examiner.*

54 In the Supreme Court of the District of Columbia.

LEFFERT L. BUCK ET AL. vs. WILLIAM H. BRAINARD ET AL. } Equity. No. 19275.

SIR: You will please take notice that the testimony on part of the plaintiffs in this case is closed. We may perhaps, however, want to identify a copy of the original of a statement of account sent by Mr. Brainard to Mr. Buck in 1880. As it is taken from the book already in evidence, there is nothing in it that will prejudice you in taking your testimony.

J. A. BURKHART,
*Solicitor for Plaintiffs.*

Leo Simmons, Esq., solicitor for defendants.

Rec. Feb. 15th, '99.

On envelope.

Joseph A. Burkhart,
Attorney-at-law,
Corcoran building, Washington, D. C.

(STAMP.) Stamped Feb. 20, 1899. 9 a. m.

LEO SIMMONS, ESQ.,
*Lawyer, City.*

1324 F St. N. W.

Joseph A. Burkart, attorney and counsellor at law, Corcoran building, Washington, D. C.

BUCK ET AL. vs. BRAINARD ET AL. } Eq. 19275.

Leo Simmons, Esq., attorney-at-law, Washington, D. C.

DEAR SIR: If agreeable to you I should like to calendar the above-entitled cause for hearing at the March term of court.

The case has been pending a long time, and we are anxious to have it disposed of.

Yours truly, JOS. A. BURKART.

Rec. Feb. 21st, '99.

"EXHIBIT No. 8."

Leffert L. Buck, civil and consulting engineer, 46 E. 21 St., New York.

FEBRUARY 12, 1898.

Mrs. Caroline B. Farrar, 83 Halsey St., Cleveland, Ohio.

DEAR MRS. FARRAR: I thank you for your very kind letter of the 9th instant and the inclosure. Owing to your brother Fred-
erick's ill health, he never made any payment on the Wash-
55 ington house. All of the payments were made by me. Although the deed was taken by him, he understood, as did

I, that it would pass by his will to his wife. After his death I finished paying for it and she conveyed it to me. I was very much surprised, therefore, to learn last year that your brother William, through Mr. Simmons, asserted a claim to the property and had brought an action of ejectment to recover it. I at once instructed Mr. James Coleman, my attorney, to defend the action, and have also advised him to take such other steps as may be necessary to protect my interests. He has in his possession a statement in your brother's handwriting, showing the payments made by me on the house before his death. I have sent for a copy of it and will forward it to you. I may state that after your brother's death I sent my sister $2,000, March 14, 1882, to finish paying for the house and also paid his funeral expenses and Dr. Young's bill for medical services rendered to him. As a matter of fact, he died insolvent.

I omitted to ask you whether Edward Albert Brainard is under 21 years of age and unmarried. Will you kindly advise me as to these facts?

Please give my kind regards to Mrs. Peck, and believe me,

Very sincerely yours, L. L. BUCK.

Mr. SIMMONS: The defendant objects to any and all evidence that may be offered now in this case which is not directly testimony in rebuttal upon the ground that the plaintiffs have closed their testimony-in-chief.

LEFFERT L. BUCK, one of the complainants, a witness heretofore examined in this cause, is recalled in rebuttal, and testified as follows:

By Mr. COLEMAN:

Q. Mr. Buck, you have already been sworn and testified in this case, I believe?

A. Yes.

Q. In your former testimony, on page 10, you testified that Mr. Brainard, in his lifetime, gave you a statement of the transactions between you and him regarding the purchase of this house?

A. Yes.

Q. And at the time of taking your testimony it was stipulated by counsel for the defendants, on page 20, that the statement might be offered in evidence. I now ask you to look at these papers and state whether they constitute the statement referred to by you in your testimony given heretofore.

A. Yes.

Q. In whose handwriting is that statement?

A. C. F. Brainard's.

Q. You knew his handwriting?

A. Yes, sir.

Q. You have seen him write?

A. Yes; I have seen him write, and had his writing, and know it as well as I know my own.

Mr. SIMMONS: I object to this statement purporting to show amounts of money received beginning with March, 1875, on the ground that it is not a statement covered by the stipulation
56 of counsel on the former hearing, and upon the further ground that it is incompetent and irrelevant. I object to the next statement, purpo-ting to be a memorandum basis of settlement, upon the ground that no such paper was mentioned at the time of the former hearing, and the stipulation did not cover that paper, and upon the further grounds that it is incompetent and irrelevant and not proper testimony in rebuttal.

By Mr. COLEMAN:

Q. From whom did you get those papers?

A. C. F. Brainard.

Q. About when?

A. I could not tell you the date of that exactly. It was when I was in Washington at one time. I cannot tell the exact date.

Q. Where were they delivered to you?

A. At the house.

Q. At his house, by him?

A. Yes, sir.

Q. The paper which is headed "1875" on the first page, purporting to be a statement of an account between Brainard and yourself, contains a statement of moneys paid by you or by him, one to the other. State what it is.

A. This money was paid to me by Mr. Brainard. When I first started to Peru, South America, I wanted somebody to send money to as I received it, and I knew of nobody that would be better than Mr. Brainard. Previous to that, with whatever savings I had accumulated, I had bought Government bonds, and I thought that as he was in one of the departments here he would be able to know how to get hold of those bonds in the best way, and I sent the money and he bought bonds with it. Finally, when he decided to buy the house, that was turned into the house.

Q. And this contains an itemized statement of the moneys given by you to him, and sent by you to him, and as of the dates when he received it?

A. I suppose they are the dates when he received it; they are the dates that he put down there.

Q. State whether or not Mr. Brainard ever paid you any money.

A. There is about sixty dollars there, I think it is; I do not remember the exact sum, but it is about sixty dollars that he has put down there as paying me. That is all that I know of.

Q. That is all you know of his ever having paid you? In one of these statements to which you have referred is this proposition: "I propose to execute a deed to L. L. Buck for an undivided one-half interest in said property, and to give him my note, with interest for the excess paid by him, or for such balance as shall be found due him after deducting $3,175 from the total payments made by him." State whether or not Mr. Brainard ever executed a deed to you or gave you his note, as stated in that proposal.

A. He never executed a deed; he gave me that settlement; that is all.

Q. Did he ever give you a note?

A. No.

Q. How long did Mr. Brainard occupy this property after the purchase?

A. He lived somewhere in the neighborhood of three years after he moved in there, I think, according to my recollection.

Q. That was up to the time of his death?

A. Yes.

57 Q. State what amount, if any, he paid you for rent during the time he occupied the property.

A. He never paid me anything for rent.

Q. Do you remember what the rental value of that property was at that time?

A. There was no valuation put on it at all.

Q. Do you know whether it was worth as much for rent then as now?

A. No.

Q. You may state whether or not you personally took part in any way in the purchase of this property.

A. In the bargaining?

Q. In the bargaining.

A. No.

Q. That was all done by whom?

A. That was all done by Mr. Brainard, I suppose. I do not know who he may have had to advise him.

Q. But you had nothing to do with it?

A. I had nothing to do with it.

Q. You relied upon his statements as to the transaction, so far as you were concerned?

A. Yes, sir; entirely.

Q. Do you know anything about his giving somebody out in St. Paul any money to invest for him?

A. No.

Q. Or whether or not he met with any losses on investments he made through some man in St. Paul? Do you know anything about that?

A. No; I only know that he told me several times that Mr. Amherst Wilder had tried to get him to go out there and go into business with him, stating that he thought he could do a little better by him that he could do in the Government employ, and he told me that he should have gone out there if it had not been for his wife; that his wife did not like to leave Washington.

Q. Do you know anything about his circumstances, whether he had any money at the time of his death?

A. I do not know of any money that he had. I know I paid for his funeral expenses, and taking his body up North, the undertaker's bill, and all. The doctor's bill I paid after Mrs. Brainard died.

Q. This statement appears to show, on one page of it the first

page, the moneys received by Brainard from you, and on the other page the way in which he expended these moneys.

A. The disposition of it—yes.

Q. Do you know of any investments where Mr. Brainard lost?

A. The only one I know of is the one that he spoke to me about, and said it was in a building association, that he had put some money in there, and that the secretary of the association had stolen twenty thousand dollars and broken it up.

Q. Did he state the amount he had in it?

A. He did not, no.

Q. What association was that—the Territorial?

A. I could not tell you that.

Q. Did you ever have any business transactions with Mr. Charles F. Brainard, excepting what you have stated, in giving him or sending him money to invest for you?

A. No; not regular business transactions.

Q. Transactions by which you would have any money of his in your hands?

A. No.

58 Q. Did you ever receive any money from him for investment?

A. No; I never received any money from him for investment.

Mr. SIMMONS: The attorney for the defendant declines to cross-examine the witness, on the ground that his evidence does not tend to rebut the evidence of the defendant.

LEFFERT L. BUCK,
*By the Examiner.*

WILLIAM P. TITCOMB was called as a witness on behalf of the plaintiffs in rebuttal and testified as follows:

By Mr. COLEMAN:

Q. Where do you reside?

A. Washington, D. C.

Q. How long have you lived here?

A. Thirty-five years.

Q. What is your occupation?

A. Disbursing agent of the United States Fish Commission.

Q. How long have you held that position?

A. Between six and seven years.

Q. Previous to that time what was your occupation?

A. I was employed in the Treasury Department in various capacities, for twenty-eight years.

Q. Did you know Charles F. Brainard in his lifetime?

A. I did.

Q. How long did you know him?

A. I should say about twenty years—from the year 1864 up to the time of his death.

Q. What were your relations with him, or how intimately were you associated with him?

A. I was very intimately associated with him, both in and out of the Treasury Department.

Q. Was he employed at the same place?

A. He was employed in the same department and our relations brought us together very frequently—I might say constantly.

Q. Are you familiar with his handwriting?

A. I am.

Q. Did you ever see him write?

A. Yes; often.

Q. Look at these papers and state in whose handwriting this statement is (handing papers to witness).

A. It is in his handwriting—Charles F. Brainard's.

(The papers constituting said statement were, at the request of counsel for the complainants, marked for identification "Complainants' Exhibit A, March 29, 1899.")

By Mr. COLEMAN:

Q. Look at this book which I hand you, which is marked on the title page, "C. F. Brainard, private, July 26th, 1879," which has already been offered in evidence, marked "Exhibit A." Please look at pages 2 and 3 of this book and state in whose handwriting the writing on each page is.

A. (After examining book.) Charles F. Brainard.

Q. Have you ever had any experience with or particular knowledge of book-keeping?

A. Yes, sir.

59 Q. What?

A. That is a branch of my occupation—keeping accounts.

Q. How long have you had such experience and knowledge?

A. More or less constantly for the last thirty-five years, or longer.

Q. Look at the statement of account, as itemized on those pages, pages 2 and 3, and state what it shows.

Mr. SIMMONS: I object to the witness's testimony, upon the ground that his evidence does not show him to be an expert in book-keeping.

A. It shows Mr. Brainard's account with Leffert L. Buck.

Q. Give any further explanation that may be necessary to give an idea of your opinion of what the pages show.

A. This statement shows the amounts that he received from Mr. Buck, and the manner in which he disposed of it.

Q. Which page shows, in your opinion, the amounts received?

A. Page 2 shows the amounts received from Mr. Buck, evidently.

Q. And page 3?

A. Page 3 shows the manner in which he had applied it.

Q. Look at the next two pages, pages 4 and 5.

A. They are a continuation of the same account.

Q. In the same handwriting?

A. In the same handwriting, all of it. The balance is carried from one page to the next.

Q. And showing what?

A. The amounts that he received from Buck and the amounts paid Buck or disposed of in various ways.

Q. Which of those pages shows the amounts received?

A. Page 4 shows the amounts received from Buck, and page 5 shows the amounts paid Buck and disposed of in other ways.

Q. You said you had been a book-keeper for how long?

A. Not continuously, but I started in the business about 1858.

Q. How much of the time since you have been so engaged?

A. For the greater part of the time I have been engaged in book-keeping—I might say all the time, except during my military service, for about three years—either in the actual book-keeping or in the supervision of it. I was Assistant Register of the Treasury for about ten or twelve years, when all the civil accounts, personal accounts of the officers of the Government were kept in the office under my charge.

Q. What were Mr. Brainard's duties in the Treasury Department?

A. He was a clerk in the office of the Secretary of the Treasury, keeping the books of the issue of bonds, registered bonds. Those bonds came to the office of the Register, where I was employed, first as a clerk and afterwards as Deputy and Assistant Register. As clerk, when I first knew him, I would receive a set of bonds, and he entered them in his books after I had entered them in the Register's books; he would enter the same bond as a check. After he had entered them the seal of the department was affixed, in the Secretary's office, and then they were returned to the Register and sent out to the owners.

60 Q. Do you know anything about Mr. Brainard's habit or manner of keeping books?

A. Yes; it was correct and accurate.

Q. Does the statement contained in the book which you have correspond with his manner of keeping books as you know it?

Mr. SIMMONS: I object to that question as being irrelevant.

A. Oh, yes; I understand this account perfectly.

Q. From his manner of keeping books?

A. Yes, sir; it has the appearance of being complete; it is certainly intelligible.

Cross-examination.

By Mr. SIMMONS:

Q. Mr. Titcomb, in what way are you connected with the complainant in this case in a business way?

A. With this case?

Q. Yes, sir.

A. I have no connection whatever with it.

Q. Are you not the agent for the complainant in this case?

A. Oh, I have been acting as the agent for Mr. Buck, in charge

of the house 1632 Rhode Island avenue, but I understood your question to relate to this suit.

Q. Now I want to ask you this question: If Mr. Brainard, as you claim, received those sums of money there, why should he debit Mr. Buck?

A. Charge Mr. Buck? I do not understand that he does. I do not understand it in that way. I do not think he has charged Mr. Buck with any money except what he paid Buck. I do not understand that this is an account against Leffert L. Buck in which these amounts are charged to him. "Cash received"—that is not charged to Mr. Buck, as I understand the account. The proper statement of that account would be, "Charles F. Brainard in account with Leffert L. Buck," and that is what Mr. Brainard intended to make.

By Mr. SIMMONS:

Q. You say that that is what Mr. Brainard intended. Does the book, from its face, show that Mr. Buck is credited there on page 2, or is he debited?

A. He is credited; it is a credit to Buck.

Q. Then the word "credit" is on page 2, is it?

A. No.

Q. How do you make the word "debit" signify "credit," then?

A. It is a debit to Brainard and a credit to Buck.

Q. Suppose that Mr. Buck had purchased something from Mr. Brainard, on which side of the book should that be placed?

A. It would depend upon the manner in which the account was stated.

Q. I mean, Mr. Titcomb, in the ordinary and usual course and form of book-keeping, if Mr. Buck were to purchase something for Mr. Brainard's use, which side should it be placed upon—upon the debit or the credit side?

A. The debit side.

Q. Assuming that Mr. Buck had money in his hands from Mr. Brainard and he purchased something for Mr. Brainard, which side would it be placed upon then? Upon which side would Mr. Brainard place it?

A. It depends upon how the account is *settled*—whether it is "C. F. Brainard in account with Leffert L. Buck" or "Leffert L.
61 Buck in account with C. F. Brainard." All my official accounts that I render to the Government are stated, "United States in account with W. P. Titcomb, disbursing agent," and not "W. P. Titcomb, disbursing agent, in account with the United States." Of course, the debit or credit depends upon which way that account is stated. As I testified before, I understand this account, and it seems perfectly clear to my mind that it is an account of Charles F. Brainard in account with Leffert L. Buck, because I find upon the credit side here, "Paid L. L. Buck, cash, $40." That shows me which is the credit side.

Q. You say you see there the words "Paid L. L. Buck." Does not the word "By" prefix that and indicate that it was paid over

by Mr. Buck to Mr. Brainard; do you not see the word "By" there ahead of the money paid?

A. I see it.

Q. You say the word "By" is there. Then why should it be there if it was paid to Mr. Buck by Mr. Brainard; why should he use the word "By"?

A. Because it is a credit to Brainard. He is credited by the amount paid L. L. Buck. It is, "Charles F. Brainard, credit by amount paid L. L. Buck, cash, $40."

Q. That is simply your version of the way that account is kept?

A. Yes.

Q. Do you know anything about it yourself individually?

A. That is apparent to my mind.

Q. That is your opinion as an expert?

A. Yes, sir; I am willing to stand on that.

WM. P. TITCOMB,
*By the Examiner.*

FRANK G. COLLINS, a witness of lawful age, called by and on behalf of the complainant-, having been first duly sworn, is examined—

By Mr. COLEMAN:

Q. Mr. Collins, what is your name?

A. Frank Gardner Collins.

Q. What is your business?

A. I am a clerk in the Treasury Department.

Q. How long have — been such?

A. Since June 5th, 1874.

Q. In what capacity?

A. I started in as a temporary clerk at $720, and now I am a graded clerk of the fourth class.

Q. What is your business there?

A. Clerical duty.

Q. In what branch or bureau?

A. In the Loan division of the Treasury Department.

Q. Did you know Charles F. Brainard in his lifetime?

A. I did.

Q. What was his business?

A. He was a clerk in the Treasury Department.

Q. Were you associated or connected with him in any way; and, if so, how?

A. I was associated with him in working on the different loans of the Government, and he used to do the examination of the bonds. I did a great part of the journalizing and he used to keep the report books. In fact we ran the different loans together.

62 Q. For how long?

A. From about 1875 until 1881, the time of his death, barring a year that I was away from there.

Q. Do you know his handwriting?

A. I do.

Q. Did you ever see him write?
A. Yes, sir.
Q. In whose handwriting is the handwriting on this paper (handing witness the two papers marked Complainants' Exhibit A, March 29th, 1899)?

Mr. SIMMONS: I object to that question on the ground that it is immaterial, incompetent, and not testimony in rebuttal.

A. Charles F. Brainard's.
Q. Both of them?
A. Yes, sir.
Q. Look at pages 2, 3, 4, and 5 in this book, marked "Exhibit No. 1, A. J., December 10th, 1898." What is that book?
A. This seems to be a personal expense account—a private expense account of Charles F. Brainard.
Q. What are the entries on pages 2, 3, 4, and 5; what do they show?

Mr. SIMMONS: I object to the question on the ground that it is immaterial, incompetent, and not properly rebuttal.

A. On page 2 it shows that Charles F. Brainard has received from Leffert L. Buck various sums of money.
Q. What does page 3 show?
A. It shows what disposition has been made of the same.
Q. And pages 4 and 5?
A. Pages 4 and 5 are the same as pages 2 and 3.
Q. Have you had any experience in book-keeping?
A. Yes, sir.
Q. What and how long a time and where?
A. With the various loans of the Government, personal accounts of myself, and bank accounts
Q. For how long?
A. I may say I have kept accounts all the time since I have been in the Treasury Department. I worked on the books all the time I have been there.

Cross-examination.

By Mr. SIMMONS:

Q. Mr. Collins, before this, when did you see the book you have in your hand?
A. I never saw that book until today.
Q. What time today?
A. I suppose it was about ten minutes of one.
Q. When did you see those two papers before?
A. Today.
Q. The exhibits you referred to?
A. Today.
Q. You were told they were in Mr. Brainard's handwriting, were you not?
A. No, sir; I was not.

Q. Were you told that was Mr. Brainard's book?
A. No, sir; I was not.
Q. Did you talk about it?
A. Not about that book.
Q. Did you talk about those papers?
A. No, sir.
63 Q. You did not talk about the matter at all?
A. Not about a book or any papers.
Q. Were they shown to you?
A. I answered that question a moment ago.
Q. I say was the book shown to you?
A. Yes, sir.
Q. By whom?
A. Mr. Coleman.
Q. He did not talk to you about it?
A. Not at all.
Q. Did he tell you what he expected you to testify?
A. No, sir.
Q. What part of the Treasury Department are you connected with?
A. The Loan division—the Secretary's office of the Treasury Department.
Q. Do you receive money from any one?
A. I receive my salary, of course.
Q. I do not mean that, Mr. Collins. I say do you receive money from any one on behalf of the United States? On behalf of the Treasury Department?
A. I receive no money except my salary.
Q. I say do you in your book-keeping, as you claim it, receive money on behalf of the Treasury Department?
A. I see what you mean. The accounts that we keep in the Loan division are accounts for the issue and redemption of bonds. You might say that we also receive money there, because we handle money at different times in the issue of bonds——
Q. Do you mean to say that if I buy a bond from the United States Government I pay the United States Government interest upon that bond?
A. Yes, sir; perhaps I can help you a little on that.
Q. No; I do not need any help. You say that you know this to be Mr. Brainard's handwriting?
A. Yes, sir.
Q. Did you ever see him write?
A. Yes, sir.
Q. Did he ever write you letters?
A. No, sir.
Q. Did you ever have a letter written by him?
A. No, sir.
Q. Look on page 155 of that book and tell me if that is Mr. Brainard's handwriting.
A. (After examining book.) Yes, sir; that is Mr. Brainard's handwriting.

Q. Look on pages 115 and 116 and tell me if that is his handwriting.

A. (After examination.) No, sir.

Q. Do you know whose handwriting that is?

A. I never saw it before.

Q. Whose handwriting is on page 87?

A. (After examination.) Charles F. Brainard's, partly down as far as "Medicine," 3.15.

Q. The other part you know nothing about?

A. That part down there I should say was in the same handwriting as the part over on the other page. I never saw it before.

Q. Look on pages back of X and back of Y, and tell me in whose handwriting those two are.

A. That is all in Charles F. Brainard's handwriting.

Q. How about the entry on page 4, "February 19th"?

A. That is all in his handwriting.

Q. How about the last entry on page 5, "June 8th"?

A. That is, too.

64 Q. You say that these charges show money received by Mr. Brainard from Mr. Buck?

A. Yes, sir.

Q. On pages 2 and 4?

A. Yes.

Q. Then why is Mr. Buck debtor on those pages?

A. He is debtor there. Brainard is debtor to Buck.

Q. Suppose Mr. Buck had kept this book; on which side would the debtor have been placed?

A. Brainard would have been debtor to Buck.

Q. Then where would the word "debtor" be placed; on which page?

A. You can only put that on one side of the book. It can only go at the proper place, on the left-hand side, and the credit on the right.

Q. Suppose Mr. Buck had money in his hands for Mr. Brainard and purchased goods and sent them to Mr. Brainard; on which side of the book would that credit be given?

A. Mr. Buck had money of Mr. Brainard's?

Q. Assuming that Mr. Buck had money of Mr. Brainard's and purchased goods for Mr. Brainard and sent them to Mr. Brainard; on which side should Mr. Brainard credit him with the amount?

A. He should credit him on the right-hand side with the goods, and debit him on the left-hand side with the money received.

Q. If Mr. Buck owed Mr. Brainard nothing and purchased $5 worth of goods for Mr. Brainard and sent them to Mr. Brainard, on which side should that charge be placed by Mr. Brainard, on the right or on the left side?

A. That is a little different account from a personal account or a private account. If you open an account of that sort, that would be Brainard debtor to Buck.

Q. What is the difference between sending me $5 and sending me $5 worth of goods?

A. No difference whatever.

Q. Then if Mr. Brainard owed Mr. Buck nothing, and purchased $5 worth of goods for Mr. Brainard, it made Mr. Brainard debtor to Mr. Buck, did it not?

A. That is right.

Q. And he should have placed it on the left-hand side?

A. Debtor to Buck.

FRANK G. COLLINS,
*By the Examiner.*

THOMAS G. JONES, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined—

By Mr. COLEMAN:

Q. You have been sworn in this case, have you, Mr. Jones?

A. Yes, sir.

Q. I do not know what you testified to, but I assume you were acquainted with Mr. Charles F. Brainard in his lifetime?

A. Yes, sir; very well.

Q. What acquaintance had you with him?

A. A very intimate social acquaintance, as far as that goes in office. I did not see him very much outside of his office.

65 Q. Just tell what your relations in the office were with him. What office were you employed in?

A. We were more or less connected and interconnected back and forth, in records of the United States loans and issues, redemptions, exchanges, transfers, and all sorts of transactions concerning the loans.

Q. For how long a time?

A. I was appointed in September, 1861. I don't remember the year he came in. I was there all the time he was there until after he died, and am there now. Both of us were in the same office.

Q. How long were you and he there together; about how long, one, two, three, or four years?

A. It seems to me I must have been acquainted with him from about 1866 or 1867.

Q. Up to the time of his death?

A. Yes, sir.

Q. Do you know his handwriting?

A. Yes, sir.

Q. Have you seen him write?

A. Yes; daily, for that matter.

Q. Look at those papers (handing witness papers marked Complainants' Exhibit A, March 29th, 1899) and see in whose handwriting they are.

A. I should say that writing is all by Mr. Brainard—in his hand. I have records of loans in which he did the writing—some of the old loans—six per cents., seven-thirties, etc.

Mr. SIMMONS: I object to all of this testimony as incompetent and irrelevant.

By Mr. COLEMAN:

Q. Look at this book which I now show you, marked Exhibit No. 1, A. J., and on the opposite page "C. F. Brainard, private, July 26th, 1879." Examine pages 2, 3, 4, and 5, and tell in whose handwriting they are, if you can.

A. It is all undoubtedly Mr. Brainard's handwriting. It is exactly the same style as the records I speak of. I saw some of them today in the office.

Q. What do the entries on those pages of the book show?

Mr. SIMMONS: I object on the ground that it is not shown that the witness is an expert.

A. The manner in which he has kept this, according to the headlines, "Dr. Leffert L. Buck" and "Leffert L. Buck, Cr.," would indicate that he had received cash from Mr. Buck.

Q. As stated on what page?

A. It may have been his own private personal account. All these items on the left-hand side, the debtor side of the account, show cash received amounting to $5,904.91. The credit side shows disbursements, and, of course, it must mean from this same fund on the left-hand side; and there is a balance of $160.56 carried forward. On page 4 the debit side foots up $2,113.49, and on the credit side, in pencil, there is a balance of $793.58.

Q. Have you had any experience in book-keeping?

A. Yes, sir.

Q. For how long?

A. The first accounts I took charge of were in Columbus, Ohio, in 1858. Then I went to Pittsburgh, and from there to Washington. I have kept church books for 28 years.

66 Cross-examination.

By Mr. SIMMONS:

Q. Mr. Jones, this paper marked "Exhibit A, March 29th, 1899," is headed "C. F. Brainard, in account, Dr.," while the book says "Leffert L. Buck, Dr." Would not the proper way to keep that book have been, instead of putting Mr. Buck's name there on page 2, to have said "C. F. Brainard, in account to Leffert L. Buck, Dr."?

A. This is a transcript of that, is it?

A. It is supposed to be, according to my friend's claim.

A. It would depend a good deal upon circumstances—what the money was received for.

Q. Why should he debtor Mr. Buck if he received the money from Mr. Buck? Do you suppose that was a mistake in putting Mr. Buck's name there?

A. Some men are not familiar with accounts. He evidently means here to involve the idea that he is debtor to Mr. Buck for money received for some purpose.

Q. But by putting Mr. Buck's name there he made a mistake. Is that what you claim?

A. I don't know whether it was a mistake according to his ideas of book-keeping. I would not say whether it was a mistake at all.

Q. But would that be the proper form in which to keep a book? Should not Mr. Brainard's name have been there in account with Mr. Buck?

A. Not in a ledger account—a debit and credit ledger account. I would simply enter the name in this way and give him credit on this side for money received from him. On the debit side I would charge items that were expended for Buck.

Q. Then he has that wrong?

A. From the standpoint of one who has studied book-keeping and taught book-keeping in a mercantile institution a while, I say that.

Q. You say what, Mr. Jones?

A. From another standpoint I would not say that it was wrong. According to his ideas of keeping books, I would not say he was wrong. He seems to keep it there with the same idea as the transcript of the account. That is the proper way of making that account: "C. F. Brainard in account with Leffert L. Buck," and he keeps the items here on the same side. He means to debit himself. A great many book-keepers charge themselves. I have heard that over and over in accounts read before associations, where a man was making his report as treasurer. He would make himself debtor for things that he ought to make himself debtor for, simply because he did not understand exactly the proper manner of keeping the accounts. I would say he means by this account to acknowledge the fact that he is indebted to Buck for money.

Q. But it is not in proper form?

A. Not according, perhaps, to scientific book-keeping.

Q. Was not Mr. Brainard a pretty good book-keeper?

A. Yes, sir; but there are a great many different ideas in the Treasury Department about how books should be kept. The character of the work he was engaged in over there, as a clerk, in making records of the loans, is not strictly called book-keeping,
67 but journalizing and checking off. In checking off loans from the books, he was considered a most excellent clerk—in all that.

Q. The book which is in evidence and Exhibit A differ in making up the account, do they not?

A. In the head-lines. He conveys the same idea there, I should say, concerning the receipt and disbursement of money, that he does in the books.

Q. That is your opinion of it?

A. That is my opinion of it, and that is the way the great mass of book-keepers who call themselves book-keepers keep accounts. It is correct according to their ideas of keeping accounts. I would have placed these figures of money received on the left-hand side of the book. From my standpoint there is no difference in the principale involved in his idea of book-keeping.

Q. If you had been keeping this book, you would have placed the amounts received——

A. If this money was coming from Buck, to be used for Buck's

account, I would give him credit on the right-hand side of the book for money received from him, and on the debit side I would have it show that the money was paid back to him. In the case of any goods being bought, or anything of that sort, I would have charged it on the debit side. Yes, from my standpoint, there is no difference in the correctness, because, of the great mass of book-keepers, thousand- would take this plan while I would take another plan.

Q. Supposing that Mr. Buck had money in his hands belonging to Mr. Brainard and bought goods for Mr. Brainard, Mr. Brainard keeping that account, on which side would he credit Mr. Buck with the amount?

A. Buck has money of his?

Q. Supposing that Buck had money in his hands belonging to Mr. Brainard and he purchases some goods for Mr. Brainard and sends them on.

A. In the first place, that money is placed with Buck to be used for Brainard's own benefit in some way.

Q. Yes; and suppose he did make a purchase for Mr. Buck and sent those goods on to him, on which side of the book should Mr. Brainard enter that credit?

A. He should enter it on the left-hand side of the account. The moment he turned the money over to Buck belonging to himself he should enter on the left-hand side, the debtor side of the account, the amount—$1,000, say—that he has turned over to Buck, because Buck is responsible to him for that $1,000.

Q. When Mr. Buck made a purchase for Mr. Brainard, on which side should he enter that?

A. On the credit side.

Q. On the right-hand side?

A. Yes; any money or goods, with a statement as to why it was entered. Brainard should give Buck credit for what Buck paid out for him out of Brainard's own money.

Redirect examination.

By Mr. COLEMAN:

Q. I understand you to say that this book appears to be a personal account with Brainard?

A. Yes, sir.

Q. Brainard's personal account with himself?

A. Yes, sir.

68 Q. It shows money received from Buck and paid out for Buck?

A. Yes, sir; if I knew all the circumstances that caused the beginning of that account, why the money was turned over to Brainard, and so forth, the answer might be different.

Recross-examination.

By Mr. SIMMONS:

Q. These accounts are a little confusing, are they not?

A. Not to me. I think they would be confusing if I did not

know what the money was being handled for—what Brainard had the money in his hand for. It seems, according to the first entry on page 3 of this book, "By purchased 3.65's at 73¾, $184.38," that Buck has purchased those 3.65's, valued in the market at that rate, against money appearing here, $225, on the other side, the debtor side.

Q. Go down further and you will see where he has paid it out.

A. I did not examine those items before I made the first answer. This debtor side evidently shows that he placed $220 in money in Buck's hands and charged him with it. He has done it right.

Q. Charged himself with it?

A. Charged Buck with it. Buck is made debtor here for $220 that Brainard must have handed over to Buck when Buck purchased these on May 1st.

Q. When Brainard purchased those, you mean?

Mr. COLEMAN: Do not interfere with the witness.

By Mr. SIMMONS:

Q. Is that what you mean? Do you mean Brainard or Buck?

A. If Brainard placed $220 in Buck's hands he has got it right here, because Buck was debtor to Brainard for that money until he made a disposition of it, as he did there, "By purchased 3.65's at 73¾, $184.38," which is a credit against money that Buck was responsible to Brainard for. I knew he was buying bonds.

Q. Do you know of any business transaction between Brainard and Buck?

A. No, sir; not at all. He didn't have much to say about business. I heard him talk incidentally about purchasing that house.

Q. You said something about bonds.

A. Yes; I knew him incidentally to speak of buying bonds occasionally. I never knew to what extent. I don't know that I ever saw a bond that he did purchase.

Q. But you do not know who he purchased them for?

A. No, sir; I don't know who for.

THOS. G. JONES,
*By the Examiner.*

69 COMPLAINANTS' EX. "A."

"*Memd. of Basis for Settlement.*"

| | |
|---|---|
| Cost of property, 1632 R. A. Ave | $6,350.00 |
| One-half of cost of property | 3,175.00 |
| L. L. Buck has paid on ac. of this property | $3,816.66 |
| Cost of one-half of property | 3,175.00 |
| Am't due L. L. Buck ac. purchase | $641.66 |

I propose to execute a deed to L. L. Buck for an undivided one-half interest in said property, and to give him my note, with inter-

est, for the excess paid by him, or for such balance as shall be found due him after deducting $3,175.00 from the total payments made by him.

| | |
|---|---|
| I have paid interest, taxes, &c., during the last year, ending Sept. 4, '80 | $361.10 |
| L. L. Buck paid during the same time | 63.75 |
| Total | $424.85 |
| Deduct my rent for said year | 360.00 |
| Each to pay one-half of this am't | $64.85 |
| Am't each to pay | $32.42 |
| Add overpay't by L. L. Buck | 641.66 |
| | $674.08 |

Deduct such charges for board of L. L. Buck as are right & Nellie's expenses other than for board, and I to give my note for balance, with interest.

This coming year I to pay him $180 rent, less one-half of taxes, &c.

C. F. Brainard. (Pencil.)

*Statement of Expenditures Made by C. F. Brainard, Ac. House and Grounds* 1632 *R. I. Ave.*

| | | | | | |
|---|---|---|---|---|---|
| 1879. | | | | | |
| Aug. | 28. | By p'd | for cutting arch, &c., 3rd floor | | $15 50 |
| Sep. | 19. | " | " | " 2 pair of blinds, hanging and painting | 8 00 |
| " | " | " | " | Jackson for work and manure for yard and grounds | 5 10 |
| " | 27. | " | " | for door strips, window strips, brads, & | |
| Oct. | 25. | | | putting on | 6 45 |
| Nov. | 13. | " | " | taxes on house & lot | 45 29 |
| 70 | | | | | |
| 1880. | | | | | |
| Jan. | 14. | " | " | insurance $1,000 on house | 3 00 |
| " | 26. | " | " | 6 mo. interest on $3,800 (3 notes) | 133 00 |
| M'ch | 12. | " | " | interest on 1st note, payment anticipated | 25 34 |
| " | 22. | " | " | repairs on range | 1 75 |
| Jun- | 8. | " | " | painting porch | 2 00 |
| " | 9. | " | " | 2 awnings for porch | 15 00 |
| " | 21. | " | " | repairing door bell | 1 75 |
| Jul- | 25. | " | " | 6 mo. interest on $2,533.33 (2 notes) | 88 67 |
| " | " | " | " | whitewashing | 75 |
| " | " | " | " | shelves, screens, & drawers | 9 50 |
| | | | | | $371 10 |

"COMPLAINANTS' EXHIBIT A," MARCH 29, 1899.

C. F. Brainard in account with Leffert L. Buck, C. E.

DR.

| | | | |
|---|---|---|---|
| 1875. | | | |
| M'ch. 12. | To cash received | | $222 00 |
| 1877. | | | |
| Sept. 13. | " " | | 200 00 |
| 1879. | | | |
| M'ch 15. | " " | | 1,391 80 |
| June 2. | " " | | 375 00 |
| July 3. | " " | | 225 00 |
| Aug. 11. | " " | | 170 00 |
| Sept. 7. | " " | | 175 00 |
| Oct. 23. | " " | | 200 00 |
| Dec. 16. | " " | | 299 69 |
| 1880. | | | |
| Jan'y 5. | " " | | 200 00 |
| M'ch 2. | " " | | 120 00 |
| " 5. | " " | | 250 00 |
| April 10. | " " | | 240 00 |
| May 7. | " " | | 200 00 |
| June 3. | " " | | 200 00 |
| | Interest & prem. rec'd | | 275 87 |
| | | | $4,742 36 |

CR.

| | | | |
|---|---|---|---|
| 1879. | | | |
| May 7. | By paid freight on furniture, &c | | $7 37 |
| July 18. | " " purchase-money acc't of house 1632 R. I. Ave | | 2,550 00 |
| " " " " | insurance | | 30 00 |
| " " " " | recording deed | | 1 50 |
| Dec. 28. | " " Leffert L. Buck, cash | | 40 00 |
| 1880. | | | |
| Jan'y 26. | " " do. " | | 20 00 |
| 71 | | | |
| M'ch 12. | " " note due July, '80, on acc't of house 1632 R. I. Ave | | 1,266 66 |
| Apr. —. | " " for repairing cellar | | 32 25 |
| June 8. | " " " 2 bot. glycerite | | 1 00 |
| | | | $3,948 78 |
| | Bal. on deposit in savings b'k | | 793 58 |
| | | | $4,742 36 |

*Memd.*

By p'd ac. house, other than purchase-money, as follows:

| | |
|---|---|
| Insurance | $30 00 |
| Deed | 1 50 |
| Repairing cellar | 32 25 |
| | $63 75 |

*Final Decree, &c.*

Filed December 6, 1899.

In the Supreme Court of the District of Columbia, This 6th Day of December, 1899.

LEFFERT L. BUCK and JAMES COLEMAN
*vs.*
WILLIAM H. BRAINARD, EDWARD ALBERT Brainard, and Eva Hanmore. } Equity. No. 19275.

This cause having come on to be heard upon the pleadings and proofs, and after hearing counsel for the respective parties, plaintiffs and defendants, Messrs. Jos. A. Burkhart and Nelson L. Robinson, solicitors for the plaintiffs, and Leo Simmons, solicitor for defendants, and the court being advised in the premises, it is, this 6th day of December, 1899—

Ordered, adjudged, and decreed that the injunction heretofore issued in this cause be made perpetual, and that the defendant William H. Brainard be, and he is hereby, perpetually enjoined from prosecuting the suit at law No. 41274 in the supreme court of the District of Columbia, now pending, for the recovery of the possession of an undivided part of that piece or parcel of ground and premises lying and being in the city of Washington, in the District of Columbia, known on the ground plan or plat of said city as lot 69, in C. H. Lindsley's subdivision of lots in square No. 182, in which the plaintiff in said suit, William H. Brainard, claims to have an estate in fee-simple, or from prosecuting any other action at law for the same cause.

It is further ordered and decreed that the said defendant, William H. Brainard, plaintiff, as aforesaid, in said action at law, and
72 the others of said defendants of full age convey, quitclaim, and release, within twenty days hereafter, all claims on their respective parts in and to the said real estate unto the said plaintiff, Leffert L. Buck, and in default of such conveyance suit, claim, or release, as aforesaid, it is further ordered and decreed that this decree shall operate and stand as such conveyance, quitclaim, and release.

It is further ordered and decreed that the plaintiffs shall recover of the defendants their costs in this cause.

A. B. HAGNER,
*Asso. Justice.*

The defendants William H. Brainard and Eva Hanmore, in their own right, and Edward Albert Brainard, the infant defendant, by his next friend, Eva Hanmore, have noted an appeal to the Court of Appeals of the District of Columbia from the above decree; which is allowed, and the bond for costs in such appeal is fixed at $250.00.

A. B. HAGNER,
*Asso. Justice.*

Dec. 5, '99.

*Order for Waiver of Citation.*

Filed December 9, 1899.

In the Supreme Court of the District of Columbia, the 8th Day of December, 1899.

LEFFERT L. BUCK ET AL.
*vs.*
WM. H. BRAINARD ET AL. } Equity. No. 19275.

The clerk of said court will please enter a waiver of citation for the plaintiffs to the appeal noted in this case.

JOS. A. BURKHART,
*Attorney for Plaintiffs.*

*Memorandum.*

December 20, 1899.—Appeal bond filed.

*Order Extending Time to File Transcript.*

Filed January 24, 1900.

In the Supreme Court of the District of Columbia.

LEFFERT L. BUCK ET AL.
*vs.*
WILLIAM H. BRAINARD ET AL. } Equity. No. 19275.

On motion of the defendants and with the consent of complainants, it is, this 24th day of January, 1900, ordered that the
73 time for filing the transcript of record on the appeal to the Court of Appeals in this case be, and the same is hereby, extended to March 1st, 1900.

A. B. HAGNER, *Justice.*

We consent to this.
J. COLEMAN,
J. A. BURKHART,
*Sol'rs for Complainants.*

*Stipulation as to Record on Appeal.*

Filed February 5, 1900.

In the Supreme Court of the District of Columbia.

WM. H. BRAINARD ET AL., Appellant-,
*vs.*
LEFFERT L. BUCK, Appellee.
} Equity. No. 19275.

It is stipulated and agreed between the counsel for the parties to this cause that the following shall constitute the record for the purpose of the appeal in this case, viz: The original bill, exhibits mentioned therein, restraining order, demurrer and decree sustaining same, giving plaintiff leave to amend the bill; the amended bill and exhibits, demurrer thereto, and decree overruling same; answer of defendants to amended bill; deposition of Lefferth L. Buck, deposition of Wm. H. Brainard, of Thos. G. Jones, Francis P. Maderia, Edwin B. Hay, Wm. P. Titcombe, and Frank G. Collins, less parts marked "omit" on the original of said depositions; letter of L. L. Buck to Caroline B. Farrar.

It is further agreed that the defendants to this suit and the parties who have made deeds to the plaintiff Buck constitute all the heirs-at-law of Chas. F. Brainard. The book, Exhibit A, and the papers marked Exhibit A, March, '99, purporting to be statements of and in the handwriting of Chas. F. Brainard and all exhibits offered by plaintiffs, including draft sent to Mrs. Brainard, excepting deeds offered from Mrs. Farrar and Mrs. Day to L. L. Buck. But the appellants in no way admit that either of said papers are properly in evidence in this cause. Book, Exhibit A, may be used as an original document without copying the entire contents of the same in record. That none of the deeds offered by the plaintiffs as being made to L. L. Buck, including the deed made by the wife of Chas. F. Brainard to said Buck, and dated on the — day of ——, 1882, were ever recorded among the land records of the District of Columbia; that on the 18th day of July, 1879, said Charles F. Brainard and wife executed a deed of trust of John F. Waggaman and John Sherman, trustees, to secure said Brainard's three notes payable to the order of Chas. H. Lindsley, amounting to the sum of $3,800, with interest at the rate of 7% per annum; that the release of said deed of trust contained the following:

"Whereas said indebtedness secured by the deed of trust from said Brainard and wife having been fully paid and satisfied by the party of the second part, the said Chas. F. Brainard, as is
74 evidenced by the signature of Chas. H. Lindsley the party secured and the cancellation of said notes by said trustees and the purpose for which said trust was created have ceased and determined."

That thereafter said Brainard and wife executed another deed of trust to Waggaman and Harland, trustees, dated July 25, 1879,

made to secure three notes of said Brainard of twelve hundred sixty-six dollars and sixty-six cents each, amounting to thirty-eight hundred dollars, with interest at seven per cent. per annum.

That on the 22nd day of September, 1880, Waggaman and Harland, trustees, executed to Charles F. Brainard a release of said trust deed, which recites:

"That whereas said indebtedness of thirty-eight hundred dollars with interest and cost as set forth in the deed of trust from said Brainard dated July 25, 1879, has been fully paid and satisfied by the party of the second part, the said Chas. F. Brainard, as is evidenced by presentation of the notes secured by said deed of trust, duly cancelled, and the purpose for which the said trust was created have ceased and determined, and said party of the second part is entitled to reconveyance."

That thereafter said Chas. F. Brainard executed to Wescott and Wetzell, trustees, a deed of trust dated September 14, 1880; which said deed of trust recites:

"That Chas. F. Brainard had received the sum of twenty-five hundred and twenty dollars on certain stock or shares of the Western Building Association, that said Brainard had executed his bond for the sum of five thousand dollars conditioned to be void upon payment of the treasurer of the Western Building Association, the sum of two dollars on each share of stock payable on the second Wednesday of each month."

That thereafter said Wetzell and Wescott, trustees, executed to Chas. F. Brainard a release, dated March 14, 1882, which recites:

"That Brainard and wife had executed a deed of trust on Sept. 14, 1880, to secure the indebtedness to the Western Building Association, that payment of said indebtedness had been fully made and satisfied to said building association, as is evidenced by the signature of W. G. Duckett, treasurer."

February 1, 1900.

LEO SIMMONS,
*Att'y for Appellant.*

J. A. BURKHART,
J. COLEMAN,
*Sol'rs for Appellees.*

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } *ss:*
*District of Columbia,* }

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 145, inclusive, to be a true and correct transcript of the
75 record, as per stipulation of counsel herein filed and made part hereof, in cause No. 19275, equity, wherein Leffert L. Buck *et al.* are complainants and William H. Brainard *et al.* are defendants, as the same remain upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 20th day of February, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 972. William H. Brainard *et al.*, appellants, *vs.* Leffert L. Buck *et al.* Court of Appeals, District of Columbia. Filed Feb. 28, 1900. Robert Willett, clerk.

76 TUESDAY, *June 5th, A. D.* 1900.

WILLIAM H. BRAINARD, EDWARD ALBERT BRAINARD, Eva Hanmore, Appellants, *vs.* LEFFERT L. BUCK and JAMES COLEMAN. } No. 972.

The argument in the above-entitled cause was commenced by Mr. D. W. Baker, attorney for the appellants, and was continued by Mr. James Coleman, attorney for the appellees, and was concluded by Mr. H. T. Taggart, attorney for the appellants.

77 WILLIAM H. BRAINARD, EDWARD ALBERT BRAINARD, and Eva Hanmore, Appellants, *vs.* LEFFERT L. BUCK and JAMES COLEMAN. } No. 972.

(Mr. Justice SHEPARD delivered the opinion of the court:)

1. An action of ejectment had been begun in the supreme court of the District, by certain heirs-at-law of Charles F. Brainard, to recover a one-fifth interest in certain lots in the city of Washington, of Leffert L. Buck who was in possession thereof through his tenant James Coleman.

Buck filed the original bill in this case, April 15, 1898, to enjoin the prosecution of said action, and to compel conveyance of the legal title. He alleged that the property had been purchased by said Charles F. Brainard about July 18, 1879, and paid for in part, at the time, with complainant's money. That complainant was the brother of Mrs. Brainard and had advanced the money at her and her husband's request in order that she might secure a home for her life. Brainard and wife had no children. He had made a will giving her all of his property, and in case he survived her, the title which had been executed to him, was to be held in trust for complainant. Complainant's money was used to make the only payments made upon the purchase in Brainard's lifetime, and after the latter's death, he paid the incumbrances securing the remainder.

Brainard died, without issue, May 13, 1881, leaving his wife who made her home upon the premises until her death on March 31, 1892. She made a conveyance to Buck, who suffered her to remain in possession until her death, and contributed to her support.

The object of the bill was to set up a resulting trust in complainant, because he had furnished the purchase-money.

Such a suit was made necessary, because the will of Brainard, made in June, 1872, on account of the ancient rule of law
78 prevailing in the District of Columbia, did not operate upon the after-acquired title. A demurrer was sustained to this bill, and under leave, complainant filed a complete amended bill taking the place of the original. This repeated substantially all of the allegations of the old bill, but made some changes in that part setting out the facts relied on to show the resulting or constructive trust.

It was alleged that money had been sent to Brainard by Buck for investment, and an itemized statement was given as having been taken from the books of Brainard.

That Brainard paid $2,550 of the money sent by Buck for investment, upon the purchase of the property, and took the deed in his own name, without the knowledge, consent or authority of complainant so to do. That afterwards Brainard paid $1,266.66 of complainant's funds upon the balance of purchase-money due, and executed a trust deed to secure the residue. That he made further payments on said indebtedness with complainant's money before his death. That upon Brainard's death his widow and complainant believed that she held the title under his will, and complainant paid the remainder of the purchase-money then due and secured by mortgage, namely, $2,000. Thereupon she conveyed to him as aforesaid. It was also alleged that, since the action of ejectment had been instituted, three of the five heirs-at-law of Brainard had quitclaimed to complainant all their interest, &c.

This amended bill was demurred to, because, among other grounds, it set up a new and different cause of action, and was therefore not proper as an amendment.

The demurrer was overruled, and upon hearing on the evidence, a decree was passed forever enjoining the prosecution of the action at law, and decreeing conveyance by defendants of the legal title to the interest claimed.

2. The purpose of both the original and the amended bill was to establish a resulting trust in favor of the complainant, because of the purchase made entirely with his money; and whilst there is some difference between the allegations of the two, in respect
79 of the facts raising the trust, there is no real repugnancy or inconsistency between them. The amendment was within the discretion of the court, and the demurrer on the ground stated was properly overruled. Jones *v.* Van Doren 130 U. S. 684, 690.

3. It appears from the evidence that Charles F. Brainard had for years been a clerk in the Treasury Department of the United States. For several years prior to his death, May 13, 1881, he had received a salary of $1,800 per year. His wife was the sister of Leffert L. Buck. They had no children. There is evidence tending to show that Brainard had some little money of his own for investment, which seems to have been lost through the failure of a building and loan association some time before his death.

Leffert L. Buck was a civil engineer and a bachelor. His residence was in the city of New York; but his professional engagements called him to different parts of the world. He testified that he went to Peru in 1875, and before leaving sent about $200 to Brainard for investment. He continued to send sums of money from time to time from 1877 to 1880, and during the latter year. Brainard invested from time to time in bonds which he sold for reinvestment.

Brainard kept an account book which has been preserved and the entries therein of money received from Buck correspond with a statement rendered to the latter and produced by him in evidence.

Buck testified that he suggested the joint purchase of the house and lot in controversy which Brainard wrote him could be had for $6,350. Brainard made the purchase at that price on July 18, 1879, making a cash payment thereon of $2,550 with Buck's money as the account book shows. The remainder was raised by mortgage. The account book, under the same date shows the charge of the cost of recording the deed, and of insurance, against Buck. The deed was made to Brainard.

Buck testified that early in 1880, he learned that the deed was in the name of Brainard alone, and suggested to the latter to convey to him and he would pay the balance, and Brainard and wife
80 could occupy the house as a home. Brainard was then in bad health. He did not wish to make the transfer then, saying that when he recovered, he would be able to go on and pay the balance on the property and would also be able to pay for Buck's half, and he thought that better than to go to the expense of making two transfers. He said that, in any event, the property would go to his wife with everything that he had in case of his death. He was sick and nervous and Buck did not press the matter. Brainard died of Bright's disease, and was suffering therefrom at the time, though it was not then known.

On March 12, 1880, he paid $1,266.66 on the mortgage with Buck's money in his hands.

Some time after that Brainard made a statement in writing of the cost of the property, showing the payments made with Buck's money and stating therein that he proposed to convey to Buck a half interest in the property, and to give him his note for the excess paid over one-half. He expected to be able to pay back to Buck this excess and also to finish paying for the property.

Buck testified that he did not agree to this, but let matters run on because of Brainard's nervous condition and because he expected the will of Brainard would invest the legal title in his sister. Brainard died without completing the payment for the property. Mrs. Brainard remained in possession claiming under the will, but conveyed the title to Buck, who paid the last mortgage amounting to nearly $2,000. Mrs. Brainard made her home there until she died on March 31, 1892. Buck was frequently there, and contributed to her support. When she died he leased the property and has since collected the rents, kept the property in repair, and paid all the taxes.

Without going into further details, it is sufficient to say that the evidence on behalf of Buck, corroborated on all material points by the entries in the book of Brainard, shows clearly that the purchase of the property was made with his money in the hands of Brainard for investment; and that Brainard was his agent and trustee and not his debtor for money lent for the purpose. From these facts, it is clear that a trust resulted in favor of Buck which
81 entitled him to a conveyance of the legal title. 2 Pom. Eq. sec. 1037.

4. We cannot agree with the contention, that complainant has been guilty of such laches in asserting his claim to equitable relief as should bar his right thereto. Townsend *v.* Vanderwerker 160 U. S. 176, 185, 186; Ruckman *v.* Cory 129 U. S. 387, 389.

In the first of those cases, the plaintiff sued to obtain specific performance of an oral contract, that had been partly performed. The contracting party had been urged to comply, but, though acknowledging the claim, she continued to postpone, and died without performance. Plaintiff had been treated as a child and lived with her for years, and she, as a reason for failure to make title, had assured him that she had provided for him in her will, and that the property would be his when she was done with it. These facts were held sufficient to explain plaintiff's delay. The court said, speaking through Mr. Justice Brown: "The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did."

The circumstances excusatory of delay are much stronger in this case than in that.

Buck entertained affection for, and had perfect confidence in Brainard. He was anxious to secure a comfortable home for his sister. Brainard became seriously ill and his condition was such that Buck would not aggravate it by importunity. Besides, he was assured that Brainard would devise the property to his sister. In fact, Brainard had made, and executed with due formality, a will leaving everything to his wife. This will was then, and until the institution of the action of ejectment, supposed to operate a conveyance of the property in question.

Buck, so believing, took a conveyance from his sister, who was childless, and paid off the last incumbrance. He suffered
82 her to occupy the house until her death. In the meantime, none of the heirs-at-law of Brainard made any claim to the property. Their apparent acquiescence tended to confirm Buck, who was in actual possession all of the time, in the belief that his title was perfect. There was nothing, therefore, to suggest the necessity or importance of resorting to a court of equity for the confirmation of that title, until the institution of the action of ejectment. When roused to action, he was diligent in taking it. This long, undisturbed possession, under a title supposed to be perfect, presents a stronger excuse for delay, also, than that held sufficient

in Ruckman *v.* Cory *supra*, wherein it was said: "Nor has the plaintiff been guilty of any such laches as would close the doors of a court of equity against him. He was in the peaceful occupancy of the premises for some years prior to any assertion of title upon the part of the defendant under the deed of 1872. If he had not been all the time in the possession of the premises, controlling them as if he were the absolute owner, the question of laches might be a more serious one than it is. The bringing of the action of ejectment was, so far as the record shows, the first notice he had of the necessity of legal proceedings for his protection against the legal title held by the defendant. As proceedings to that end were not unreasonably delayed, we do not perceive that laches can be imputed to him. Laches are rather to be imputed to the defendant, who, although claiming to have been the absolute owner of the lands since 1862, took no action against the plaintiff until the ejectment suit was instituted."

The decree appealed from was right, and must be affirmed with costs.

Affirmed.

SETH SHEPARD,
*Associate Justice.*

83 TUESDAY, *June 12th, A. D.* 1900.

WILLIAM H. BRAINARD, EDWARD Albert Brainard, and Eva Hanmore, Appellants,
*vs.*
LEFFERT L. BUCK and JAMES Coleman.
} No. 972, April Term, 1900.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

June 12, 1900.

84 DISTRICT OF COLUMBIA, *ss:*

Personally appeared Victor Anderson and being duly sworn says he is engaged in business as a real-estate broker, and has been so engaged, in the District of Columbia for the past nine years; that he has examined the premises known as 1632 Rhode Island avenue N. W., the same being located upon lot 69, square 182, of the city of Washington, District of Columbia; that he is of the opinion that said property is worth at least $15,000.00, and that said amount is the fair market value of same.

VICTOR ANDERSON.

Subscribed and sworn to before me this 23rd day of June, A. D. 1900.

HENRY W REED,
*Notary Public.*

[SEAL.]

DISTRICT OF COLUMBIA, *ss:*

Personally appeared W. W. Souder, and being duly sworn, says he is engaged in business as a builder and contractor, and has been so engaged, in the District of Columbia, for the past ten years; that he examined the premises known as 1632 Rhode Island avenue, N. W., the same being located upon lot 69, in square 182, of the city of Washington, District of Columbia; that he is of the opinion that said property is worth at least $14,000.00, and that said amount is the fair market value of same.

W. W. SOUDER.

Subscribed and sworn to before me this 23d day of June, A. D. 1900.

HENRY W. REED,
*Notary Public.*

[SEAL.]

(Endorsed:) Court of Appeals, D. C., April term 1900. No. 972. Wm. H. Brainard, *et al.*, appellants, *vs.* Leffert L. Buck, *et al.* Affidavits (2) as to value of property in controversy. Court of Appeals, District of Columbia. Filed Jun- 29, 1900. Robert Willett, clerk.

85 In the Court of Appeals of the District of Columbia.

WILLIAM H. BRAINARD ET AL., Appellants,
*vs.*
BUCK ET AL., Appellees.
} No. 972.

To the honorable the Chief Justice and associate justices of the Court of Appeals of the District of Columbia:

Your petitioners, William H. Brainard, Edward Albert Brainard and Eva Hanmore, appellants, respectfully represent:

1. That they are the appellants in the above-entitled cause and that on the — day of June, A. D. 1900 the decree of the supreme court of the District of Columbia, in the above-entitled cause was affirmed.

2. That your appellants are the owners of two-fifths of the property mentioned in the said bill and that they have been perpetually enjoined and restrained from setting up any right, title or interest in and to the said property.

3. That the said property is of the value of between fourteen and fifteen thousand dollars, and the said appellees have received rent at the rate of fifty dollars per month for said property since 1891.

4. That the interest of your petitioners far exceeds the sum of five thousand dollars, and your petitioners refer to the affidavits herewith filed and make them a part of this petition.

5. And your petitioners feeling aggrieved at the decree of this court in said cause desire to appeal the same to the Supreme Court of the United States.

Wherefore, the premises considered your petitioners pray that an appeal be allowed to the said Supreme Court of the United States and that the bond be fixed at a reasonable sum; and that
86 they may have such other and further relief as the nature of this petition may require.

WILLIAM H. BRAINARD,
ALBERT BRAINARD,
EVA HANMORE,
By D. W. BAKER.

Appeal to the Supreme Court of the United States allowed and bond for costs fixed at five hundred dollars, this 28th day of June, 1900.

M. F. MORRIS,
*Associate Justice.*

(Endorsed:) Court of Appeals, D. C., April term 1900. No. 972. Wm. H. Brainard, *et al.* appellants, *vs.* Leffert L. Buck, *et al.* Petition for allowance of appeal to Supreme Court U. S., order allowing same and fixing bond for costs at $500. Court of Appeals, District of Columbia. Filed Jun- 29, 1900. Robert Willett, clerk.

87 Know all men by these presents, that we, William H. Brainard, Eva Hanmore and Edward Albert ——, as princi-pal-, and Victor Anderson, as suret-, are held and firmly bound unto James Coleman and Leffert L. Buck in the full and just sum of five hundred dollars to be paid to the said James Coleman and Leffert L. Buck, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of June, in the year of our Lord one thousand nine hundred.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between William H. Brainard, Eva Hanmore and Edward Albert Brainard a decree was rendered against the said William H. Brainard, and Eva Hanmore and Edward Albert Brainard and the said William H. Brainard, Eva Hanmore and Edward Albert Brainard having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said James Coleman and Leffert L. Buck citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof,

Now, the condition of the above obligation is such, that if the said William H. Brainard, Eva Hanmore and Edward Albert Brainard shall prosecute their appeal to effect, and answer all costs if they fail

to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM H. BRAINARD, [SEAL.]
By att'y, LEO SIMMONS.
EVA HANMORE, [SEAL.]
By att'y, LEO SIMMONS.
EDWARD ALBERT BRAINARD, [SEAL.]
By att'y, LEO SIMMONS.
VICTOR ANDERSON. [SEAL.]

Sealed and delivered in the presence of—
GEO. W. MADERT,
As to all signatures.

Approved by—
M. F. MORRIS,
*Associate Justice Court of Appeals, D. C.*

[Endorsed:] No. 972. William H. Brainard *et al. vs.* Leffert L. Buck *et al.* Bond on appeal to Supreme Court U. S. Court of Appeals District of Columbia. Filed Jun- 29, 1900 Robert Willett clerk.

88 UNITED STATES OF AMERICA, *ss:*

To Leffert L. Buck and James Coleman, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein William H. Brainard, Edward Albert Brainard and Eva Hanmore are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable M. F. Morris, associate justice of the Court of Appeals of the District of Columbia, this 29th day of June, in the year of our Lord one thousand nine hundred.

M. F. MORRIS,
*Associate Justice of the Court of Appeals of the District of Columbia.*

Service accepted—
J. COLEMAN,
*Sol'r for Appellee Leffert L. Buck, & in Pro. Persona,*

this 30th day of June 1900.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jul- 2 1900 Robert Willett clerk.

89 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 88, inclusive, contain a true and correct transcript of the record and proceedings of said Court of Appeals in the case of William H. Brainard, Edward Albert Brainard and Eva Hanmore, appellants *vs.* Leffert L. Buck and James Coleman No. 972, April term, 1900, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 16th day of July A. D. 1900.

ROBERT WILLETT,
*Clerk of the Court of Appeals of the District of Columbia.*

Endorsed on cover: File No. 17,837. District of Columbia Court of Appeals. Term No. 110. William H. Brainard, Edward Albert Brainard and Eva Hanmore, appellants, *vs.* Leffert L. Buck and James Coleman. Filed July 19, 1900.

JAN 9 1902
JAMES H. McKENNEY,
Clerk.

No. 110.

By. of Taggart, Simmons & Baker for Appts.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Jan. 9, 1902.

**No. 110.**

WILLIAM H. BRAINARD, EDWARD ALBERT BRAINARD, EVA HANMORE, APPELLANTS,

*vs.*

LEFFERT L. BUCK AND JAMES COLEMAN.

**Appeal from the Court of Appeals of the District of Columbia.**

## BRIEF FOR APPELLANTS.

HUGH T. TAGGART,
LEO SIMMONS,
D. W. BAKER,
*Attorneys for Appellants.*

LAW REPORTER PRINT.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1901.

**No. 110.**

WILLIAM H. BRAINARD, EDWARD ALBERT BRAINARD, EVA HANMORE, APPELLANTS,

*vs.*

LEFFERT L. BUCK AND JAMES COLEMAN.

**Appeal from the Court of Appeals of the District of Columbia.**

## BRIEF FOR APPELLANTS.

This appeal is taken from an affirmance by the Court of Appeals of the District of Columbia of a decree, passed at a special term of the Supreme Court of said District, in an equity cause, wherein appellees are complainants and appellants are defendants, perpetually enjoining the appellants from prosecuting an action of ejectment for the recovery of an undivided part of the property described in the bill filed in the cause, and requiring the defendants to convey, quit-claim and release the same to complainant Buck within twenty days, in default of which the decree should operate and stand as such conveyance (Rec., pp. 76–77).

The pleadings consist of an original bill, filed April 15, 1898 (Rec., pp. 1–4), and Exhibits A, B and C (Rec., pp.

5–8); of a demurrer thereto (Rec., pp. 14, 15), which was sustained, with leave to amend (Rec., p. 15); of an amended bill (Rec., p. 16), and an additional Exhibit D (Rec., p. 20), and of a demurrer thereto (Rec., p. 21), which was overruled, with a requirement to answer within ten days (Rec., p. 22), and of an answer of the defendants (Rec., p. 22), and of a replication (Rec., p. 26).

The remainder of the Record consists of the depositions of witnesses on both sides, and of papers referred to therein or given in evidence. These papers are not placed in proper order in the Record, and in identifying them the same mark has been given to certain of them, which are of a different and distinct nature. What purports to be a copy of the will of Charles F. Brainard was marked "Exhibit A" (Rec., p. 5); an account from a book, which book was introduced as part of complainants' testimony, was marked also as "Exhibit A" (Rec., pp. 8, 9); and a number of other accounts from the same book were also marked "Exhibit A" (Rec., pp. 10–14); and still another account, entitled "Memd. of Basis for Settlement," was also marked "Complainant's Ex. A" (Rec., p. 73).

A stipulation was entered into by counsel in regard to the Record and exhibits, in which it was agreed, among other things, that the printing of the entire contents of the book above mentioned may be dispensed with and the book itself used at the hearing if necessary (Rec., p. 76).

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## STATEMENT OF THE CASE.

The history of the record title to the lot, in so far as it has any bearing upon the questions involved in the controversy, is as follows:

Charles H. Lindsley conveyed it to Charles F. Brainard, by deed in fee in the usual form, dated July 18, 1879, and

recorded the same day in Liber 920, at folio 249 of the land records, reciting a consideration paid by the grantee of $6,350.

Brainard and his wife, Cornelia A., conveyed it to John F. Waggaman and John Sherman in trust, by deed dated July 18, 1879, and recorded on the same day in Liber 920, at folio 251 of said land records. The deed recites that said Brainard is indebted to said Lindsley in the sum of $3,800, part of the purchase-money, for which said Brainard had made and delivered his three promissory notes of even date payable to said Lindsley's order in one, two and three years, with interest, and respectively for the sums of $1,266, $1,267 and $1,267, and recites that the conveyance is made to secure payment of the same by Brainard.

Waggaman and Sherman, trustees, reconveyed the premises to said Charles F. Brainard by deed dated July 25, 1879, and recorded on same day in Liber 917, at folio 476 of said records, releasing the trust. After referring to the trust, the deed states that the indebtedness secured thereby had been—

> "fully paid and satisfied by the party of the second part, the said Charles F. Brainard, as is evidenced by the signature of Charles H. Lindsley, the party secured"—

and that the notes had been canceled.

Charles H. Lindsley and wife again conveyed the lot in fee to said Brainard by deed dated July 23, 1879, and recorded on July 26, 1879, in Liber 918, at folio 357, of said records, for the consideration of $6,350 paid by grantee.

Brainard and wife conveyed the lot to John F. Waggaman and James A. Harban, in trust, by deed dated July 25, 1879, and recorded on July 26, 1879, in Liber 918, at folio 359 of said records. This deed recites that said Brainard is indebted to said Lindsley in the sum of $3,800, part of the purchase-money, for which said Brainard had made and delivered his three promissory notes of even date, each for the sum of $1,266.66, and payable to said Lindsley's order

in one, two and three years with interest, and recites that the conveyance is made to secure the payment of the same by Brainard.

Waggaman and Harban, trustees, reconveyed the premises to said Charles F. Brainard by deed dated September 17, 1880, and recorded on September 22, 1880, in Liber 945, at folio 451 of said records, releasing the trust. This deed, after referring to the deed of trust, states that the indebtedness secured thereby had been "fully paid and satisfied by the party of the second part, Charles F. Brainard."

Brainard and wife conveyed the lot to Edward S. Westcott and William W. Wetzell, trustees, by deed dated September 14, 1880, and recorded September 17, 1880, in Liber 949, at folio 405 of said records.

This deed recites that said Brainard had executed a bond to the Western Building Association, conditioned for the repayment in monthly instalments of advances made to him by the association, amounting to $2,520, and that the object of the deed is to secure such repayment by Brainard.

Westcott and Wetzell, trustees, executed to Charles F. Brainard, a deed of release of the trust, dated March 15, 1882, and recorded April 1, 1882, in Liber 1003, at folio 39 of said records. It was executed after the grantee's death

Upon the face of these deeds to Brainard no trust is declared and none can be implied for the benefit of any other person.

Brainard entered into possession of the lot upon the conveyance of the same to him by Charles H. Lindsley and occupied the same as his residence until his death, which took place May 13, 1881. He died without issue, and his heirs at law were his three brothers and two sisters. Appellant William H. Brainard is one of the brothers, and appellant Edward Albert Brainard, an infant, is the only child and heir of another brother, since deceased, and of whom appellant Eva Hanmore is the widow. All of the heirs were non-residents of the District at the time of

Charles F. Brainard's death, and have since been non-residents. Cornelia A. Brainard, the widow of Charles F. Brainard, occupied the property until her death, which took place March 31, 1892. Her brother Buck, appellee, has since rented it and collected the rents and applied them to his own use. The appellee Coleman has occupied it for several years as lessee of Buck, and has attorned to him as such.

In this condition of the record title, and on July 26, 1897, William H. Brainard, as one of the heirs of his late brother, Charles F. Brainard, brought ejectment against Coleman for an undivided interest in the lot. After issue was joined and the case calendared for trial, the original bill in the present case was exhibited by appellees, Buck and Coleman, against appellants, praying that they be perpetually enjoined from prosecuting the ejectment suit—

> "And that it may be declared that the said lands are charged with a trust in favor of and ought to be held for the use and benefit of the said plaintiff, Leffert L. Buck, and that the said defendants, or so many and such of them as shall appear to have the legal title to said lands may be decreed to convey such legal title free of all incumbrances done or suffered by them or any or either of them," etc., (Rec., p. 4).

## Averments of Fact in the Original Bill.

Complainant Buck bases his right to the relief sought, and the case made by the bill which is sworn to by Buck depends upon, the averments of fact in paragraph 8 thereof (Rec., pp. 2, 3), which are in substance as follows:

That he was the brother of Cornelia A. Brainard, the wife of Charles F. Brainard; that said Brainard was a clerk in the Treasury Department, with little or no means of support other than his salary; that he, Buck, "being willing to aid and assist his sister, and being *solicited* by her and

her husband to do so, *furnished and advanced the money to pay for the said property;" that it was advanced partly to Brainard, partly to his wife and partly in taking up and paying off incumbrances.*

That—

> "*said money was so advanced and said property purchased for the sole and only purpose of giving to the said Cornelia A. Brainard a home,* and that it was *so understood* by the said Brainard at the time of said purchase."

That—

> "*the said property was conveyed to the said Brainard instead of to his wife,* for the reason that prior to said conveyance the said Brainard had executed his will, by which said will he had devised and bequeathed to his said wife all his property of every kind, and it was understood by the said Brainard and his wife that if she should survive him the property would descend to her, and in the event she should not survive him, her said husband, she would have a home on said property during her lifetime, and that during said period said Brainard should hold the title to said property as trustee for said Leffert L. Buck."

A trust created by express agreement of the parties by parol, is thus alleged, which the court is asked to establish and enforce in contravention of the Statute of Frauds (Abert's Comp. Laws of D. C., p. 231, Secs. 8, 9).

In the eighth paragraph it is averred that after the death of her husband, and until her own death in 1892, Mrs. Brainard occupied the property; in the ninth paragraph it is averred that by deed dated March 31, 1882 (about ten months after her husband's death), and "in anticipation" of her own death (which did not happen until ten years thereafter), she conveyed the lot to said Buck, who thereupon "entered into possession of, and has ever since remained in possession of, the same."

This deed from Mrs. Brainard to Buck, executed 16 years before, but not recorded, is filed as an exhibit to the bill (Rec., p. 7). The consideration stated in it is $6,350, paid by Buck to her.

## Demurrer to Original Bill.

To the bill a demurrer was interposed upon the ground that the alleged agreement was void under the Statute of Frauds, because not reduced to writing, and upon the ground of *laches*, and it was sustained with leave to complainants to amend "as they may be advised" (Rec., 14, 15.)

Under the circumstances, nothing was available by way of amendment but the insertion of an averment that the alleged agreement *was* manifested by a writing, and an explanation of the delay in seeking relief, or perhaps, averments of new and repugnant facts coupled with a showing that in respect of the original averments complainant was mistaken or had been misinformed; we say "perhaps" for the reason that the only averment made in the original bill upon information and belief is in paragraph 9 and has relation solely to those comprising the next of kin of Charles F. Brainard.

An amended bill was filed, however, (Rec, p. 16), in which neither of said averments was inserted, and in which there is a complete and absolute change in the facts averred, as grounds for relief, without any explanation whatever as to the reasons for such change; those set forth in the original bill are entirely abandoned and ignored, and a different state of facts altogether is set up—facts which are utterly and radically inconsistent with those stated in the original bill, and which clearly constitute a new and different case from that made by the original bill.

## Averments of the Amended Bill.

In this amended bill, complainant Buck bases his right to the relief sought, and the case made by it depends upon,

the averments in paragraphs 9 and 10 thereof (Rec., pp. 17, 18), which are as follows:

(*a*) "That from March 12, 1875, until June 3, 1880," he sent to Brainard as his "*agent*" various sums of money, the dates and amounts of which are stated in exhibit D. (This exhibit is on page 20 of the Record, and foots up a total of $7,857.04, and it may be here stated that no attempt was made in the proof to establish its correctness.)

(*b*) That he, Buck—

> "*authorized* the said Charles F. Brainard, *as agent for him, the said Leffert L. Buck*, to invest the same in real-estate bonds and securities in the city of Washington."

(*c*) That—

> "on or about the 18th day of July, 1879, the said Charles F. Brainard purchased the said property . . . for the sum of $6,350, and paid on said purchase-price the sum of $2,550 out of the moneys so sent him for investment."

(*d*) "That upon said purchase the said Charles F. Brainard *took the deed of said property to himself without the knowledge, consent or authority*"

of him, said Buck.

(*e*) That on July 25, 1879, the said Brainard executed to Waggaman and Harban, trustees, a deed of trust on the property to secure the balance of the purchase money.

(*f*) That thereafter and on or about March 12, 1880, the said Brainard made a further payment of $1,266.66 on the property out of said moneys so sent him for investment;

> "*and that said deed of trust was executed without the knowledge, consent or authority* of the said plaintiff, Leffert L. Buck."

(*g*) That on the 8th day of June, 1880, "and before his death," Brainard made further payments on said property not exceeding in amount $650 out of said moneys.

(*h*) That after the death of Brainard his wife informed Buck that she held the legal title to the property under the will of her husband, and that there was unpaid upon the trust deed the sum of $1,971.81; that he, Buck, paid this balance, and that thereupon she executed the deed dated March 21, 1882, above mentioned, conveying the property to him, Buck, and—

> "on said day Buck entered into and has ever since remained in undisturbed possession of said premises."

## Demurrer to Amended Bill.

A demurrer was interposed to the amended bill, one of the grounds of which was that complainants had set up a new and a different cause of action from the one alleged in the original bill; another of the grounds was *laches* on the part of complainants (Rec., p. 21).

This demurrer was overruled and defendants were required to answer within ten days.

## Answer to Amended Bill.

Appellants thereupon answered specifically, denying the above-mentioned allegations of the amended bill as to Charles F. Brainard's lack of pecuniary resources, and otherwise; and averring that said Brainard had been in the receipt of a large salary, $1,800 per annum, as a clerk in the Treasury Department, from the year 1867 until the time of his death; they aver that said Brainard bought the property, paying part of the purchase-money with his own funds; that he executed and delivered his promissory notes for the residue, and that he and his wife executed a deed of trust upon the property to secure the said notes; and that on the loan made to him by the building association he made repayments monthly of $36 until the time of his death; that said Brainard bought the property and took the title thereto on his own account

and for his own use, and that Buck had no legal or equitable interest in it (Rec., pp. 22–25).

Testimony was taken on both sides under the amended bill, upon which the court below passed the decree from which the appeal was taken to the Court of Appeals.

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## ASSIGNMENT OF ERRORS.

1. The Court of Appeals erred in not remanding the cause to the Supreme Court of the District of Columbia with directions to vacate the order overruling the demurrer of appellants to the amended bill and to dismiss said bill.

2. The Court of Appeals erred in affirming the decree of the Supreme Court of the District of Columbia and in not remanding the cause to said court with directions to dismiss the bill.

3. If the appellee is entitled to any relief under the amended bill the testimony fails to sustain the claim made to the whole property, and at most establishes his right to a decree for an accounting between the parties and an equitable lien for such sum as may be found due him, or to an undivided moiety of the property, and to an accounting between the parties in regard thereto, and in this view the Court of Appeals erred in not remanding the cause with instructions to vacate said decree, and to pass a decree adjusting accordingly the rights of the parties.

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## ARGUMENT.

### The First Assignment of Error.

The amended bill was filed without authority other than the general leave to amend and without notice to the defendants. The objections to it could only be urged under the

circumstances in one of two ways—by a motion to strike it out or by a demurrer thereto.

The latter course was adopted. The question might well be raised by demurrer.

> Insurance Co. *vs.* Bahnke, 4 App. D. C. 371, 378.
> Ogden *vs.* Moore, 95 Mich. 293.
> 1 Daniel's Chancery Practice (4th Ed.), 583.

The demurrer to the amended bill should have been sustained. It is impossible for the original and amended bills, both of which are sworn to by complainant Buck, to stand together because of irreconcilable inconsistency between them. The amended bill sets up a different state of facts, and is based upon a different theory as to the relief prayed from those urged in the original bill.

Contrasting the two bills with respect to material averments we have the following results:

In the amended bill the averment of the original is repeated, that Buck was a brother of Cornelia A., the wife of Charles F. Brainard, who was a clerk in the Treasury Department, and had "little or no means of support outside of the salary" which he received as such clerk (par. 9, Rec., p. 12). Except as to this the divergence is complete.

In the original bill it is alleged that because of the slender resources of Brainard he, Buck, was willing "to aid and assist his sister," and that being *solicited* by her and her husband, to do so, he had furnished and advanced the money to pay for the property, and that—

> "*said money was so advanced and said property purchased, for the sole and only purpose* of giving to the said Cornelia A. Brainard a home,"

and "*that the property was conveyed to the said Brainard, instead of to his wife*" because it was understood by the husband and wife, that under the will of the husband the property would go to her if she survived him (par. 8, Rec., pp. 2, 3).

These averments are pointed to the effect that he, Buck, was fully aware of the execution of the deed to Brainard

and of the reasons therefor and of every circumstance connected with it, and of every step taken by Brainard and his wife, in the acquisition of the property, and that he did not forbid, object to or question the propriety of anything they did in the premises, but fully assented to the same; and that he did not consider and did not claim that any act of theirs in the premises was done or performed in bad faith or involved any fraud upon him.

He could have used no other form of words by which his admissions and concessions in these respects might have been made more clear; yet under color of amendment he suppresses and ignores these averments, and substitutes for them others (par. 9, Rec., p. 17), which are totally at variance with them, the substance of which is given on pages 7, 8 and 9 of this brief.

The new position taken by him is that he sent moneys to Brainard as his "*agent*" and "*authorized*" Brainard "*as agent for him, said Leffert L. Buck,*" to invest the same in obligations secured upon real estate; that Brainard purchased the property for the sum of $6,350 and paid on the purchase $2,550 in cash out of moneys so sent him by Buck for investment; "*that Brainard took the deed of said property to himself without the knowledge, consent or authority*" of him, said Buck; and that Brainard and his wife executed the deed of trust to secure the balance of the purchase-money, also "*without the knowledge, consent or authority*" of him, said Buck; and hence, as the court must infer, that Brainard had acted in bad faith and that the transaction was consummated in fraud of his (Buck's) rights in the premises.

Manifestly the averments of both bills, as to the circumstances attending the acquisition of the property can not be true. The authorities are unanimous that a bill so amended can not stand, and that it should be dismissed.

In the case of Marble *vs.* Bonhotel, 35 Ill. 248, the court, after stating that the verification of the bill by oath does not necessarily deprive the complainant of the benefit of an amendment, says:

"It is, however, no doubt true that he is estopped from so amending his bill *as to contradict facts which he has sworn to be positively true*, unless he can clearly show the court that such statements were made in mistake."

The complainant Buck evidently knew that he could not make such showing, for he did not attempt to do so.

"The amendments made to sworn bills must be consistent with the original bill; and they must be made without striking out or departing from the allegations in the original bill."

1 Daniel's Ch. Pr. & Pl., Sec. 404, note 1.

"The rule is well settled that matter which constitutes a new bill, or matter inconsistent with or repugnant to the substantive allegations of the original bill, can not be introduced by amendment. Jennison's Ch. Pr. & Pl. 97; Daniel's Ch. Pr. & Pl. (5th Ed.) 402, Sec. 8, note 8; 1 Barber's Ch. Pr. 207; Freeman *vs.* Banks, Har. Ch. 311.

"The amendment is regarded as a continuation of the orginal bill, and as forming part of it; both constitute but one record. Daniel's Ch. Pl. & Pr. 402; Munch *vs.* Shabel, 37 Mich. 166. The bill therefore embraces two inconsistent theories based upon inconsistent and repugnant averments. The order of the court must be reversed," etc.

Ogden *vs.* Moore, 95 Mich. 293.

"Where an amended bill is sought to be filed which is based upon allegations contradicting those in the prior bill, these allegations being of substantial and basal facts, it seems to us that the court may properly refuse to allow it to be filed. The bill is not stating new and additional facts; it is not alleging in a fuller or different way facts hitherto averred; it is not an amended bill, but a bill contradicting the basis upon which the complainant sought to proceed."

Mr. Justice Brewer in Nat. Met. Bank *vs.* Dispatch Co., 38 Fed. Rep. 58.

> "While amendments to a bill in chancery are liberally allowed, as to parties, prayer for relief, and as to substance germane to and in enlargement or explanatory of the substantial parts of the bill, on which the relief prayed for is predicated, the orator is never allowed by amendment to bring upon the record new matter *repugnant to or inconsistent with* that set forth in the bill, nor substantially to make a new bill. Barnes *vs.* Grunzeback, 1 Ed. Ch. 49; Daniel's Ch. Pr. & Pl. 469 and notes."
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> Hill *vs.* Hill, 52 Vt. 582.

This court in Shields *vs.* Barrow, 17 How. 120, announces the rule in the following terms:

> "Nor is a complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment. We apprehend that the true rule on this subject is laid down by the vice chancellor in Verplank *vs.* The Mercantile Ins. Co., 1 Ed. Ch. 46. Under privilege of amending a party is not to be permitted to make a new bill. Amendments can only be allowed where the bill is found defective in proper parties, in the prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer. See, also the authorities there referred to and Story's Eq. Pleading, 884."

The issues of fact arising upon the original bill in the case at bar are—

1. Whether Charles F. Brainard agreed with complainant Buck, as averred, that the property should be purchased by Buck, and the title taken in Brainard's name in trust for Mrs. Brainard for life, with remainder to said Buck.

2. Whether, as averred, the said Buck advanced the entire purchase-money with that understanding.

The facts were clear, but even if true, relief could not be

granted, because there was no memorandum in writing signed by Brainard or by some one for him evincing such understanding.

The issues of fact arising upon the amended bill are—

1. Whether said Buck placed moneys in the hands of said Brainard as his agent for investment in bonds, etc.—secured upon real estate—prior to the purchase of the lot.

2. If so, whether said Brainard invested the same in the purchase of the lot, taking the title in his own name, without the consent or knowledge of said Buck, and with intent to defraud said Buck, and how much was invested in said lot under such conditions.

The two sets of issues are entirely different from and contradictory of each other; the variance is so pronounced that the bills can not stand together, as parts of the same pleading.

The case was otherwise in Jones *vs.* Van Doren, 130 U. S. 684, 690, referred to in the opinion of the Court of Appeals (Rec., p. 81), in support of the position that the bills in the present case were not repugnant.

In Jones *vs.* Van Doren Mr. Justice Gray, in delivering the opinion of the court, said:

> "The only difference between the original and amended bills is, that the first alleges that the defendant Jones took the conveyance of the plaintiff's right of dower upon express trust for her, whereas the second alleges that he procured the conveyance from her by fraudulent misrepresentation as to the nature of the instrument, creating a trust by operation of law in her favor. The other allegations of the bills are substantially identical."

The authorities above cited and relied upon by appellants are conclusive to the point, that such amendments as those in the present case ought not to be permitted, for to

> "While amendments to a bill in chancery are liberally allowed, as to parties, prayer for relief, and as to substance germane to and in enlargement or explanatory of the substantial parts of the bill, on which the relief prayed for is predicated, the orator is never allowed by amendment to bring upon the record new matter *repugnant to or inconsistent with* that set forth in the bill, nor substantially to make a new bill. Barnes *vs.* Grunzeback, 1 Ed. Ch. 49; Daniel's Ch. Pr. & Pl. 469 and notes."
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1. Whether said Buck placed moneys in the hands of said Brainard as his agent for investment in bonds, etc.—secured upon real estate—prior to the purchase of the lot.

2. If so, whether said Brainard invested the same in the purchase of the lot, taking the title in his own name, without the consent or knowledge of said Buck, and with intent to defraud said Buck, and how much was invested in said lot under such conditions.

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The authorities above cited and relied upon by appellants are conclusive to the point, that such amendments as those in the present case ought not to be permitted, for to

do so would be to allow a complainant TO SWEAR POSITIVELY IN HIS BILL TO CERTAIN ALLEGATIONS OF FACT AS TRUE, AND BY AMENDMENT TO SWEAR POSITIVELY THAT THE FORMER STATEMENTS WERE FALSE. He is estopped from attempting the contradiction.

## The Second Assignment of Error.

The relief prayed should have been denied on the proofs, and the suit dismissed, and the Court of Appeals should have so held.

The original and amended bills are sworn to by complainant Buck. He was the only witness examined in chief in his own behalf; and although he was as well and as fully informed in the premises when he swore to one state of facts in his original bill as he was when he swore to another and an inconsistent state of facts in his amended bill, and as he was when he was sworn as a witness in his own behalf, testified before the examiner, nevertheless his deposition not only fails to sustain the averments of fact in either bill, but makes out a case which is clearly a different one from that made in either. This is not permissible.

"A party is not allowed to state one case in a bill or answer and to make out a different one by proof."

Bone *vs.* Child, 10 Pet. 179.

Henry *vs.* Suttle, 42 Fed. R. 94.

In his testimony he states (Rec., p. 28):

> "About 1878, as I had no settled home, *I suggested to him that we should buy a house together* in Washington, for my part as headquarters, and to be a home for himself and wife. . . . *After we had talked about several different houses, we finally decided to buy the house at 1632 Rhode Island avenue,* which Mr. Brainard wrote to me could be obtained for $6,350. . . . I replied *that if he was satisfied the house was worth the money, and would be a pleasant place to live, he should buy it—I to pay one-half; he the other half.*"

There is no averment in either bill which this statement proves. It certainly does not sustain the one made in the original bill, that he "furnished and advanced" the money for the purchase of the property at the request of Mr. and Mrs. Brainard "solely for the purpose of providing a home" for the latter, the purchase of which he left to them, and the deed to be taken in the name of Brainard in accordance with an understanding and agreement between all parties. Nor does it support the averment made in the amended bill, that he had entrusted Brainard with money, as his agent, for investment in one manner, and that Brainard had fraudulently misappropriated it by applying it to his (Brainard's) own purposes in the purchase of the property in his own name, without his (Buck's) "*knowledge, consent or authority.*"

Certain entries in the account rendered by Brainard to Buck (complainant's Exhibit A, "Memd. of Basis of Settlement,") which was given in evidence by Buck indicate necessarily that the deed to Brainard was taken with Buck's full knowledge and consent and approbation.

The entries referred to are as follows (Rec., p. 74):

| | |
|---|---|
| I have paid interest, taxes, etc., during the last year ending September 4, '80... | $361 10 |
| L. L. Buck paid during the same time... | 63 75 |
| | $424 85 |

The $63.75 he itemized (Rec., p. 76) as follows:

| | |
|---|---|
| Insurance | $30 00 |
| Deed | 1 50 |
| Repairing cellar | 32 25 |
| | $63 75 |

By referring to Brainard's book it will be seen that the first two of the entries were made on July 18, 1879, the date of the deed to Brainard. The inference is irresistible that

Buck made two payments in person; and Buck's own testimony corroborates the inference (Rec., p. 60):

> "Q. You may state whether you *personally* took any part in the purchase of this property?
> "A. In the bargaining?
> "Q. In the bargaining.
> "A. No."

The reasonable conclusion from the manner of this answer is that he did personally take part in the acquisition of the property in some other way, such as the recording of the deed and the payment of the insurance.

He (Buck) then proceeds (Rec., p. 29):

> "When we agreed to buy the house together, I supposed it would be in the name of both. *Along early in 1880 I learned that the property had been bought in his name alone. In the summer of 1880 I spoke to him about it*, and told him that if he would transfer *the property to me, in my name, I would pay for the balance*, and that he could have it for his home. *He did not wish to transfer the property to me. I understood—in fact, he told me*—that when he recovered (he was sick at the time) that he would be able to go on and pay the balance on the house, *and would be able to pay me for my part of it*, and own it in his own name, and he thought that would be better than to go to the expense of two transfers."

He claims that Brainard was sick in the summer of 1880, and that he (Buck) assented to this on that account, yet the evidence shows that Brainard performed the services required of him by the Government for a whole year after that date; that in fact he was not absent from his work and drew his salary regularly, as shown by the accounts kept by him up to within ten days of his death, when he was suddenly stricken with paralysis.

Was the language of Buck to Brainard, at the time of the suggestion by him to Brainard of a transfer of the property, that of a man speaking to his agent, with reference to prop-

erty fraudulently bought in the agent's name, with the money of his principal, as averred in the amended bill? Surely not. Nor is the reply imputed to Brainard such as might have been expected from a man conscious of such wrongdoing as Buck imputes to him. In any event, the testimony, if true, establishes the fact that the property was bought on the joint account of Brainard and Buck, and that they had an equal interest in the title, which is in flat contradiction of the averments of the amended bill. By the latter, as we have seen, Brainard is charged with fraud and excluded from any beneficial interest whatever in the property.

Even if they agreed to buy the property together, each to pay equally and each to own one-half, and the fact was established (which it has not been) that at various times Buck's money had been used to pay all the purchase money he would not be entitled to have the entire property, but only one-half of it, and an accounting with a lien for the balance due him.

Dickson *vs.* Patterson, 160 U. S. 584.

Furthermore, even if it be assumed, as averred in the bill, that Brainard was originally a wrongdoer, and had been guilty of fraud or deception in the acquisition of the property (which is nowhere apparent in the record from any credible evidence), it is nevertheless clear from Buck's testimony that he had agreed to treat the transaction as a binding one; with the option to affirm or repudiate, he concluded to let it stand.

> "Transactions although impeachable in equity at the time of inception, and for some time afterwards, on the ground of fraud, may become unimpeachable by a subsequent confirmation, by acquiescence, or by mere lapse of time."

Ker on Fraud and Mistake, 296.

On cross-examination, after testifying (Rec., p. 24) that it was understood between Brainard and himself that Brainard was to invest his money "in interest-bearing securities," Buck further testified that at the interview between him and Brainard in the summer of 1880, after he, Buck, had learned that the title to the property was in Brainard's name, Brainard said he—

> "would like to keep the property in his own name, and if he recovered he would like to pay for it, and pay me for my share.
>
> Q. You agreed to that, did you?
>
> A. *Yes.* We were doing everything we could to help him recover his health if possible.

After this interview, whatever they may have been before, the relations of Brainard and Buck were those of debtor and creditor; for there was not only acquiescence in, but confirmation, with full knowledge on his part, of the acts which he alleges as affecting his rights.

> "The doctrine of acquiescence applies as between trustee and *cestui que trust*, even in cases of express trusts."
>
> Ker on Fraud and Mistake, 303.

> "But as soon as a man with full knowledge of his rights . . . and of all the material circumstances of the case freely and advisedly does anything which amounts to the recognition of the transaction, or acts in a manner inconsistent with its repudiation . . . there is acquiescence, and the transaction, though originally impeachable, becomes unimpeachable in equity."
>
> Ibid, 302.

All the parties concerned in or having any knowledge of the transactions are dead, save Buck alone. In his effort to enforce alleged obligations of the dead his averments of fact in his pleadings in regard to such obligations should be

clear and consistent and his testimony in support of them should be clear and consistent with them; if not he must take the risk of presumptions against him.

Crosby *vs.* Buchanan, 23 Wall. U. S. 420.

The tergiversations of complainant Buck, in his written and oral statements under oath, are of such a character as to preclude the acceptance of any fact as true which is dependent merely upon his testimony for its establishment, and which is adverse to the defendants. He has absolutely destroyed his credit as a witness, except in respect of such matters as are otherwise proved, or are admitted or involve declarations against his interest.

The showing above, we submit, is amply sufficient to justify this criticism, but there are other features of his statements which may be referred to as further demonstrating the unreliability of his memory, and the ease and facility with which in a brief space of time he can involve himself in contradictions under oath.

He states (Rec., pp. 27, 28) that he went to Peru about March, 12, 1875; that he then had a little money which he requested Mr. Brainard to take and invest for him, telling him that from time to time, as he, Buck, had money to invest, he would send it to him, Brainard, for that purpose; that he, Buck, returned from Peru about April of 1876; that before starting for Peru he sent Brainard $200; that upon his return he sent Brainard money, as he had it "to invest as usual;" he further says (Rec., bottom of pp. 31, 32):

> "I did not keep any account of the money I sent him; he gave me a statement of the account, copied from the book. . . . As I had not any account, and did not keep any account of it, I have not sufficient recollection to say" [*i. e.*, whether, as appears from the context, the account (complainant's Exh. A, Rec. pp. 75) given him by Brainard was correct].

In his amended bill he swears that the account Exhibit D (Rec., p. 20), footing up $7,857.04, is a correct one of moneys sent Brainard; yet the account which he says Brainard gave him, and upon which he says he is entirely dependent for information, aggregates only $4,742.36; and shows that the amount Brainard received on March 12, 1875, from him was $220, and that two years and eight months elapsed before he sent Brainard a further sum, and that this further sum was $200 only.

He states that when he suggested to Brainard, in the summer of 1880, that the property be conveyed to him, and Brainard declined, Brainard said (Rec., p. 29)—

> "that in any event, if he was taken away, the property would go to his wife—all he had," etc.
> "Q. Do you remember anything about a will?
> "A. I do not remember anything about a will, *except I have the impression*, as I believe I stated before, that he said whatever property he had would go to his wife."

In the original bill he swears (Rec., pp. 3, 4) that the reason the property was conveyed to Brainard "instead of to his wife" was that Brainard had executed a will devising to her all his property. In the amended bill he pretends that he knew nothing of the deed to Brainard, and avers (par. 10, Rec., p. 18) that he first heard of the will when his sister, after the death of her husband, informed him that "she held the legal title to the property" under it.

It may be here remarked that although it is averred in the fourth paragraph of the amended bill that Brainard executed a will in 1872, and that the answer does not admit the fact but demands proof of it, there is not a scintilla of such proof in the record.

Again—prior to the filing of the original bill, and on February 12, 1898, he wrote Mrs. Farrar, one of the heirs of Charles F. Brainard (Rec., pp. 54, 55), as follows:

"Owing to your brother Frederick's ill-health, he never made any payment on the Washington house. All the payments were made by me. *Although the deed was taken by him, he understood, as I did, that it would pass by his will.*"

This letter alone is sufficient, as matter of evidence, to demonstrate that the position taken by him in his amended bill is unfounded, and to demolish it completely.

Other than Buck's deposition, the only evidence offered in support of the amended bill is the statement said to be in Brainard's handwriting, and to have been given to him by Brainard, and entitled "Memd. of Basis of Settlement" (Rec., p. 73), and the accounts (Rec., p. 8–14) from the book said to have been found among Brainard's effects after his death. They are inclusive as evidence in support of, and in fact they tend to disprove the averments of both bills.

Buck states that he heard of the taking of the deed in Brainard's name early in 1880 (Rec., p. 29); that he spoke to him about it in the summer of that year (Ibid.), and said to Brainard that if the latter would convey the property to him he (Buck) would pay the balance of the purchase money, and that Brainard declined to do this, saying that he would be able to pay Buck and pay for the property; later, and in the fall of the same year, desiring to relieve himself of his indebtedness to an amount equal to one-half of the value of the house, he, Brainard, proposed in the "Memd. of Basis for Settlement" (Rec., p. 73) to convey a one half interest in the house to Buck. From this nothing appears to indicate that Brainard and Buck stood in any other relation to each other than the ordinary one of debtor and creditor.

Defendant William H. Brainard testified that before the purchase of the house, his brother stated that as soon as he could find one to suit him, he intended to buy it (Rec., p. 47); and that after its purchase he always spoke of it as his own

house. The "Memd. for Basis of Settlement" negatives the idea that Brainard had previously regarded Buck as having any interest in the property. The memorandum was made between September 4 and September 16, 1880, for the former date is mentioned in the memorandum itself, and the latter date is the first date in the account entitled "C. F. Brainard, ac. ½ Property 1632 R. I. Ave." (Rec., p. 12), the opening and keeping of which was evidently based on the idea on Brainard's part that thereafter the property was to be considered as joint property. The fact that prior to September, 1880, Brainard considered himself as alone the owner of the property is strongly, we might say conclusively, shown by the account entitled "No. 1632 R. I. Ave. House, Repairs, &c." (Rec. p. 11), in which payment is shown out of Brainard's funds of $133, $88.67 and $25.34, on January 26, March 12 and May 25, 1880, respectively, for interest on the purchase-money notes; while after the proposition of Brainard to settle his indebtedness to Buck by conveying to him a half-interest in the property, he enters under date of September 16, 1880, in the account "C. F. Brainard, ac. ½ Property 1632 R. I. Ave." the item of $26.10 for interest, paid out of his own funds, on the purchase-money notes.

In regard to the account "Leffert L. Buck, Cr.," and "Leffert L. Buck, Dr.," it is evident upon the face of it and from the expert testimony that it was not kept according to the requirements of a system of scientific bookkeeping, and that the only office intended by Brainard for the entries was that of a memorandum of the amounts received by him from Buck, and of the actual disposition made of such moneys.

No moneys of Buck came into Brainard's hands after June 3, 1880, and if the "Basis for Settlement" be admissible at all, it must be accepted as a correct statement of the pecuniary relations between Brainard and Buck at the time it was made out, in September, 1880, and is the equivalent

of an express declaration by Brainard to Buck in the following terms:

> "I am indebted to you at this date in the sum of $3,816.16 on account of moneys of yours, and which I used in paying for the house, which I bought not on your account alone nor on our joint account, but on my own account solely. I propose to settle my debt to you by conveying a one-half interest in the property to you for $3,175.00, and to give you my note for the difference, $641.66, less some proper offsets for board for you and Nellie."

It is evident on the face of this proposition to settle, that it was made after September 4, 1880. Buck does not impeach the correctness of the account; he has in fact no account of his own independent of it (Rec., p. 32), and he puts it in evidence and relies upon it.

The settlement proposed was to the advantage of Buck. He testifies that during the previous summer he suggested to Brainard to convey the whole property to him and he would pay off the balance due upon it, and that Brainard did not accede to the suggestion, saying that he would be able to pay Buck for his half of it, and the expense of two transfers be thus avoided (Rec., p. 29); and that he, Buck, agreed to this (Rec., p. 35). This agreement gave him nothing as security for Brainard's whole debt to him, but Brainard's personal obligation, while the proposition for settlement gave him absolutely an undivided one-half interest in the property, of the value of $3,175, with a personal obligation of Brainard for the small remainder of the debt only.

In view of this and of the fact that Buck does not deny its acceptance, and of Brainard's subsequent action there can be no doubt that the proposition was accepted, and that a new agreement was entered into upon its terms. Brainard pays at once out of his own funds $26.10 accrued interest to the time, on the existing debt; he obtains a loan of $2,520 from the Western Building Association, to be repaid in

monthly instalments, and on September 14, 1880, he and his wife execute a trust upon the property to secure it; the unmatured debt upon it is paid off and released; and from that time on and until the date of his death Brainard makes out of his own funds the monthly return payments, which were continued by his wife, and amounted to $826.35 (Rec., pp. 12, 13).

In either case, and whether Brainard be considered at the time of his death as the owner of the whole property, and his indebtedness to Buck be considered as the whole amount of the advances made to him by Buck, or whether Buck be considered as the equitable owner of an undivided half of the property and his indebtedness to Buck be considered as simply the balance of the advances, less $3,175, the value of one-half of the property, it is clear that Buck might have collected every dollar due him by seasonable action.

What Brainard's complete assets were at the time of his death does not appear; his receipts from salary and sources other than Buck, for one year and eight months were upwards of $4,300 (Rec., pp. 8, 9); but it does certainly appear that he, Brainard, did not die insolvent, as alleged; he had $1,000 to his credit in bank (Rec., pp. 42, 46); he had from $1,500 to $2,000 worth of furniture (Rec., p. 41), as testified by appellant W. H. Brainard, and not denied—amounting in all to upwards of $2,500; and he had the house subject to the balance due the building association, assets more than sufficient to settle every dollar of Brainard's indebtedness to him. He did not see fit to enforce the payment, but allowed the assets to be dissipated, except the household furniture and effects, which he took after Mr. Brainard's death, and now, after he has had the benefit of the use and of the rents of the property for seventeen years (and any indebtedness of Brainard at the time of his death has been doubly paid in such rents), he asks in his amended bill that Brainard be convicted of fraud upon him, and that the property be decreed as his absolutely.

The case is without a scintilla of credible evidence, as we have seen, to show that Brainard held the money of Buck, as an agent, and with any limitations upon his right to invest it on his own account. No fraud in the transaction being shown, is the mere fact that he saw fit to buy the property on his own account and to use a part of the money in making the cash payment, giving his own notes to secure the remainder, sufficient to raise a resulting trust?

The authorities are clearly to the contrary, even in a case where the money is advanced expressly for the purpose of being used in paying part of the purchase-money. It is said:

> "The principle is that the whole consideration for the whole estate or for the moiety or third or some other definite part of the whole must be paid to be the foundation of a resulting trust; and that the contribution or payment of a sum of money generally for the estate, when such payment does not constitute the whole consideration, does not raise a trust by operation of law for him who pays it; and the reason for the distinction obviously is that neither the entire interest in the whole estate, nor in any given part of it, could result from such payment to the party who makes it, without injustice to the grantee by whom the residue of the consideration is contributed."
>
> White *vs.* Carpenter, 2 Paige Ch, 241.

> "To establish a resulting trust in lands in favor of the person who advanced the purchase-money, while the title was taken in the name of another, it must shown that the consideration moved from him in the first instance, and as a part of the original transaction; that he furnished the purchase money if money was paid, or other things of value which constituted the consideration, or that the credit, if credit was given, was extended to him."
>
> Bibb *vs.* Hunter, 79 Ala. 352.

"When a part of the purchase money is paid by one, and the whole title is taken by another a resulting trust *pro tanto* may under some circumstances be created. But in the latter case we believe it to be well settled that the part of the purchase-money paid by him in whose favor the resulting trust is sought to be enforced, must be shown to have been paid for some specific part or distinct interest in the estate; for some aliquot part as it is sometimes expressed; that is for a specific share, as tenancy in common or joint tenancy, or one-half, one-quarter or other particular fraction of the whole; or for a particular interest, as a life estate or tenancy for years, or remainder in the whole; and that a general contribution of a sum of money towards the entire purchase is not sufficient."

McGowan *vs.* McGowan, 14 Gray, 119.

See, also, Bailey *vs.* Hemenway, 147 Mass. 326.

Sayre *vs.* Townsend, 15 Wend. 651.

"Where the purchase-money is all paid by one and the property is conveyed to another, there is a resulting trust in favor of the party paying, unless there be something which takes the case out of the operation of the general rule. But where he furnishes only a part of the amount paid no trust arises unless his part is some definite portion of the whole, and is paid for some aliquot part of the property as a fourth, a third or a moiety. There must be no uncertainty as to the proportion of the property to which the trust extends. . . . Such a trust must arise, if at all, at the time the purchase is made. The funds must then be advanced and invested. It can not be created by after advances or funds subsequently furnished. It does not arise upon subsequent payments under a contract by another to purchase. *A trust to the extent of the payment made would not support the case made in the bill. The complainant claims to have owned the entire estate.*"

Olcott *vs.* Bynum, 17 Wall. 59–60.

"While there is no doubt of the general proposition that a trust results to him who pays the consideration for an estate where the title is taken in the name of another; that such trust is not within the statute, and that parol evidence is admissible to show whose money was actually paid for the property, it is equally clear that the trust must have arisen at the time the purchase was made, and that the whole consideration must have been paid or secured at the time of or prior to the purchase. *Olcott* v. *Bynum*, 17 Wall. 44; *White* v. *Carpenter*, 2 Paige, 217, 241; *Buck* v. *Swazey*, 35 Me. 41; 1 Perry on Trusts, Sec. 133; 2 Pom. Eq. Jur., Sec. 1037. But, as before stated, parol evidence is competent to prove that the consideration actually moved from the *cestui que trust*. *Boyd* v. *McLean*, 1 Johns. Ch. 582; *Baker* v. *Vining*, 30 Me. 121; *Whitmore* v. *Larned*, 70 Me. 276; *Page* v. *Page*, 8 N. H. 187, 195; 2 Pom. Eq. Jur., Sec. 1040. It follows that the bill of complaint should show, without ambiguity or equivocation, that the whole of the consideration appropriate to that share of the land which the plaintiffs claim, by virtue of such payment, was paid before the deed was taken. Tested by these rules, we think the claimants have failed to make out their case with the clearness which the law demands."

Ducie *vs.* Ford, 138 U. S. 592.

Chancellor Kent says, in Parkhurst *vs.* Van Courtlandt, 1 Johns. Ch. 281:

> "I am warranted in considering it a settled principle that if the court can not ascertain with reasonable certainty the terms of the agreement from the writing, or from some other paper to which it refers, the writing does not take case out of the statute."

The same rule would apply with greater force to such a case as this where from the writing produced the fact that there was any agreement of the kind claimed by appellee Buck can not be ascertained "with reasonable certainty;" and where from the writing it can be ascertained "with rea-

sonable certainty" that there was in fact no such agreement as a part of the original transaction.

"It appears to be equally well settled," he says in the same case—

> "that when the agreement is thus defective, it can not be supplied by parol proof, for that would be at once to open the door to perjury, and to introduce all the mischiefs which the Statute of Frauds and Perjuries was intended to prevent."

We submit that it is a singular, not to say a suspicious, circumstance that while Buck had access to all of the papers and effects of Charles F. Brainard, after the latter's death, and that they came into his (Buck's) possession after the death of Mrs. Brainard, he has not produced a single letter written by him to Brainard nor produced a single letter written by Brainard to him to enlighten the exact nature of the pecuniary relations between them, although he admits receiving such letters (Rec., p. 28); his statement that he made no entry or memorandum and kept no account of amounts sent Brainard, or of the purposes for which sent, is improbable, especially in view of the fact that he kept a diary in which he says he entered less important matters (Rec., bottom of page 34). It is inconceivable that of important matters such as Buck alleges in his original bill, or such as he alleges in his amended bill, or such as he testifies to in his deposition, there should not be a vestige of evidence left more conclusive in support of his pretensions than that afforded by the entries in Brainard's memorandum book, and by those in the overture for settlement.

## The Question of Laches.

*Laches* can not be attributed to the appellants, but should be to the appellee, Buck, under the circumstances disclosed; as the situation appeared to them respectively the former acted with diligence and good faith, the latter did not.

The legal title is shown by the land records to have been in Charles F. Brainard, and he was in possession at the time of his death; these facts were known to appellee Buck for seventeen years prior to the institution of his suit; the widow is permitted to continue in occupation; she had not color of title and her occupation was the possession of appellants; the occupation could not become adversary until some notice of the fact was brought home to appellants; this was not done during her lifetime; certainly Buck's unrecorded deed, the existence of which was unknown to appellants, did not constitute such notice; they did not become aware of her death for some years after it occurred; down to the time of her death there was no visible manifestation of an adverse holding; from this time only could the statute begin to run; after learning that Coleman was in possession and claiming adversely, the adult appellant seasonably invoked his remedy.

How different is the light in which appellee Buck appears; he knew everything that appellant knew in regard to the condition of the record title, and in addition he knew other things which appellant did not know, and among them the fact that he had obtained a deed from Mrs. Brainard in 1882, the existence of which he was concealing by keeping it from the public records; if this deed had been recorded it would have been color of title to Buck; it was executed and delivered in March, 1882, but it was not recorded either during Mrs. Brainard's lifetime or since her death nor brought to light until in its unrecorded state, it was attached in 1898 as an exhibit to appellees' bill. Why?

Can any other reason be assigned for the omission than his fear, that if recorded it might attract the attention of Brainard's heirs, and result in their taking possession of the property if vacant, or in the institution of a suit by them for its recovery, if occupied.

He knew before Brainard's death that the legal title was in Brainard, and that upon his death it passed to his heirs unaf-

fected by the will filed as an exhibit to his alleged bill, and which purports to have been made seven years before it was acquired; he knew during Brainard's lifetime and after his death that against a purchaser in good faith he could not prevail; he knew that if his claims and pretensions were well founded an equity court would establish them; and that until this was done he must remain in the eye of the law a stranger to the title, a mere trespasser, and that the interest claimed by him must remain valueless.

That he did not act at once under the influence of such important and strongly persuasive considerations and invoke the aid of the court, but waited for seventeen years before doing so, and then only after proceedings had been instituted by the legal owner to enforce his right of possession, is a fact characteristic neither of good faith nor diligence.

If appellee Buck ever had the rights asserted in any one of his contradictory claims, his present predicament is due entirely to his own failure to act with diligence in their enforcement; he shows no meritorious reason why an equity court should at this late date relieve him.

The doctrine of Ruckman *vs.* Cory, 129 U. S. 397, was never intended to apply to such a case.

> "Lapse of time and the death of the parties to the deed have always been considered in a court of chancery, entitled to great weight, and almost controlling circumstances in cases of this kind;"

that is, when the controversy grows out of stale transactions.

Jenkins *vs.* Pye, 12 Pet. 254.

> "In all cases where actual fraud is not made out, but the imputation is upon conjecture, where the seal of death has closed the lips of those whose characters are involved, and lapse of time has impaired the recollection of the transaction and obscured the details, the welfare of society demands the rigid enforcement of the rule of diligence."

Hammond *vs.* Hopkins, 143 U. S. 224.

If the case, as it appears at the hearing, is liable to the objection of staleness—

> "by reason of the *laches* of the complainants the court will, upon that ground, be passive and refuse relief."
>
> Richards *vs.* Mackall, 124 U. S. 187.

> "Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive and does nothing."
>
> Lord Camden in Smith *vs.* Clay; quoted with approval in Speidel *vs.* Henrici, 120 U. S. 387, and in Brown *vs.* County of Buena Vista, 95 U. S. 157.

The complainants, we contend, have utterly failed to make out any case entitling them to relief; that they have, in the language or the court in Ducie *vs.* Ford, *supra*, "failed to make out their case with the clearness and certainty which the law demands" seems beyond question.

Divested of imputations of fraud, based upon unproved averments of fact in respect of the circumstances attending the execution of the deed to Brainard, the case of appellees is reduced to a naked request preferred to an equity court by a party merely in possession of property, that another invested with the legal title and a right to the possession, shall be deprived of his privilege to sue for its recovery.

## The Third Assignment of Error.

While, under the well-established rules of equity procedure, we believe that the reasons given in support of our first and second assignments of errors are conclusive against the decree which gives the entire property to appellee Buck and divests Brainard's heirs of all interest in it, as specifically prayed in the amended bill, nevertheless we

submit that in no possible view of the evidence, even upon a proper bill, could Buck be properly held to be entitled, as a matter of equitable right, to more than a decree for an accounting wherein he should be credited with advances of money made by him to Brainard in the latter's lifetime and invested by the latter in the property, and further credited with the sum paid by him after Brainard's death in the settlement of Brainard's debt to the building association secured by the deed of trust (thus subrogating him to the rights of the association), and charged with rents and other proper offsets, and with an equitable lien on the property for the balance thus found to be due, if any.

Or, on the other hand, to a decree for an undivided moiety of the property and for an accounting in like manner, wherein he should be credited with any sums of his money invested by Brainard in the purchase of the property, over and above one-half of the purchase-money, including therein the debt to the building association, and .charged with rents and other proper offsets, with an equitable lien upon the remaining moiety of the property for the balance thus found to be due, if any.

The first suggestion accords with the fact that Brainard, in his lifetime, used of Buck's money in paying on the purchase-money of the property ($3,816), and allows him to be subrogated to the rights of the building association for the payment made to it after Brainard's death, Buck having no legal or equitable title to the whole or an aliquot part of the property.

The latter suggestion accords with his, Buck's, last representation (that given in his deposition) if not with the ones made in his bills, as to the property.

He testifies (Rec., p. 28):

> "About 1878, as I had no settled home, *I suggested to him that we should buy a house together* in Washington, for my part as headquarters and to be a

home for himself and his wife. . . . *After we had talked about several different houses we finally decided to buy the house 1632 Rhode Island aaenue*, which Mr. Brainard wrote me could be obtained for $6,350 . . . I replied *that if he was satisfied the house was worth the money and would be a pleasant place to live that he should buy it—I to pay one-half; he the other half.*"

And further (Rec., p. 29):

> "When we agreed to buy the house together I supposed it would be in the name of both. Along early in 1880, I learned that the property had been bought in his name alone. In the summer of 1880, I spoke to him about it, and told him that if he would transfer the property to me in my name I would pay for the balance, and he could have it for his home. I *understood—in fact, he told me*—that when he recovered (he was sick at the time) that he would be able to go and pay the balance on the house, *and would be able to pay me for my part of it*, and own it in his own name, and he thought that would be better than to go to the expense of two transfers."

To this he says he agreed (Rec., p. 35).

Later, and between September 4 and September 16, 1880, as we have seen, he states that Brainard gave him the "Memd. Basis for Settlement" proposing to convey to him an undivided half of the property, and which was acted upon by Brainard as accepted, as shown by the opening by him, Brainard, of an account with one-half of the property.

This put the arrangement between Brainard and Buck in precisely the situation claimed by Buck in his deposition, as the proper one, in so far as equality of title was concerned, and treating the account thus opened by Brainard as a memorandum in writing would avoid the Statute of Frauds and allow the agreement to be enforced.

The failure to make the deed would be immaterial upon the principle that equity would consider that as having been done which ought to have been done, in adjusting the rights of the parties.

**Brainard's heirs stand in the same relation to the property that Brainard himself would have stood in were he alive, and to hold under the circumstances, that they shall be deprived of all interest in the property is most inequitable and unjust.**

According to the "Memd. Basis for Settlement," which must be taken as a final settlement of their pecuniary relations and as a correct one—for Buck introduces and relies upon it—and he advanced no money to Brainard after it was delivered by Brainard to him in September, 1880—it states the entire indebtedness af Brainard to him at that time as $3,816, and so remained the debt at the time of Brainard's death.

In 1882, and a few months after Brainard's death, he paid off the debt to the building association, obtained a deed from Mrs. Brainard and took possession of the property; and he has since had the entire control and use of it; he permitted her to occupy it until her death, and for ten years past he has collected rent from it at the rate of $65 per month and he got Brainard's furniture after the widow's death.

The whole amount of his money put into the property in Brainard's lifetime was $3,816, and he paid off the building association debt of $1,971, after Brainard's death, making the sum total of his moneys applied to paying for the property nearly $600 short of the purchase-money which was paid by Brainard.

Buck took no personal risk or obligation whatsoever as to deferred payments of purchase-money, **and if the house had been destroyed by fire or depreciated**

in value, Brainard alone would have been responsible for the portion unpaid.

The property, however, has greatly increased in value, being now worth about $15,000, and an affirmance of the decree would, we respectfully insist, be tantamount to a gift of it to Buck, after he has been reimbursed in full for all just claim which he had against it.

He declares in his deposition that the agreement between himself and Brainard was for the acquisition of an equal interest, each to contribute equally to the purchase-money, and even if the fact were that Brainard had improperly applied Buck's funds to the payment of the whole of the purchase-money a claim on his part to the whole of the property should not be allowed.

As to this the case of Dickson *vs.* Patterson, 160 U. S. 584, is directly in point; there the court held that if two persons agree to buy property jointly, and even if through the fraud of one of them, in misrepresenting the amount of the purchase-money, the other is induced to advance the whole, the defrauded party is not entitled to the whole of the property, but only to one-half according to the agreement, and to a lien upon the other's share paid over and above one-half of the actual cost, and that an accounting should be had between the parties.

Before closing this brief some reference is proper to the opinion of the court below.

The learned judge who delivered the opinion is certainly mistaken when he says (Rec., p. 82):

> "Buck says he did not accept the agreement, but let matters run on because of Brainard's nervous condition and because he expected the will of Brainard would vest the legal title in his sister."

Buck did not testify that he did not accept the proposition of Brainard in the "Memd. Basis of Settlement;" he

did not testify that he let matters run on account of Brainard's ill-health. What he said in reference to Brainard's ill-health had relation to a different matter; that is, his own proposition to Brainard in the summer of 1880 and before the "Memd. Basis of Settlement" was delivered to him, that if Brainard would transfer the property to him he would pay off the incumbrance, which proposition Brainard declined, saying, as Buck testifies (Rec., p. 29), that when he, Brainard, recovered he would be able to pay off the incumbrance, and also to pay Buck for his half; and Buck testifies (Rec., p. 35) that he *agreed* to this, being induced thereto by the condition of Brainard's health, but agreeing to it nevertheless; nor did he testify that he let matters run on because of his expectation that the will of Brainard would vest the legal title in his, Buck's, sister.

What he testified in regard to the will is as follows (Rec., p. 30):

> "Q. Do you remember anything about a will?
>
> "A. *I do not know anything about a will*, except that I have an impression, as I believe I stated before, that whatever property he had would go to his wife.
>
> "Q. Did he say anything about a will at the time? (referring to the time he and Brainard talked about the property).
>
> "*No, he did not say anything* about a will that I heard of."

The learned judge (Rec., p. 81) states that there was evidence showing that Brainard had lost money through the failure of a building association. Buck, to be sure, says (Rec., p. 30), that Brainard had told him so, but Brainard's brother testifies (Rec., p. 44), that he and his brother were interested in a building association which had failed, and that neither of them had lost anything by the failure, as they had withdrawn from it seven years before the house was bought; the entries in Brainard's book shows that he

received considerable sums, not loans, from such associations (Rec., pp. 8, 9), in the fourteen months preceding his (Brainard's) death.

If under the prayer for general relief it was proper to give Buck any relief at all, it should have been to the extent, only, indicated in one or the other of the alternatives suggested.

With due deference we submit that the conclusions reached by the court are based upon a misapprehension of the facts in the case and their true import.

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*Attorneys for Appellants.*

No. 110.

FILED
JAN 14 1902
JAMES H. McKENNEY,
Clerk.

Brf. of Coleman for Appellees

# In the Supreme Court of the United States.

Filed Jan. 14, 1902.

## October Term, 1901.

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WILLIAM H. BRAINARD, EDWARD ALBERT BRAINARD and EVA HANMORE, Appellants,
*vs.*
LEFFERT L. BUCK and JAMES COLEMAN, *Appellees.*
} No. 110.

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# Brief of J. Coleman for Leffert L. Buck, Appellee.

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JAMES COLEMAN,
*Solicitor for Complainant Leffert L. Buck.*

PRESS OF BYRON S. ADAMS.



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*vs.*
LEFFERT L. BUCK and JAMES COLEMAN, *Appellees.*
No. 110.

**Brief of J. Coleman for Leffert L. Buck, Appellee.**

The bill in this action is filed to enjoin a suit at law, No. 41,274, which is an action of ejectment brought to recover the possession of an undivided one-third of the premises known as 1632 Rhode Island Avenue.

The bill was filed April 15, 1898. The appellees are Leffert L. Buck, who claims to be the owner of the premises, and James Coleman, lessee under Buck. The appellants are William H. Brainard—the plaintiff in the ejectment suit—and others, some of the heirs at law of Charles F. Brainard, deceased, who, in his lifetime was the owner of the premises. (R., pp. 1–8.)

To the bill filed, the defendant Brainard demurred, and the demurrer was sustained by the Court, Mr. Justice Cox, *with leave to the plaintiffs to amend their bill within twenty (20) days from the date of the order sustaining the demurrer.* (R., pp. 14–15.)

On the 21st day of May, 1898, the plaintiffs filed the amended bill.

The parties to the original and amended bills are the same.

The property described is the same in both bills and the same relief is prayed; that is that the property be decreed to be charged with a trust in favor of the plaintiff Leffert L. Buck.

The only difference in the bills being, that the amended bill alleges facts regarding the transaction stated in the original bill, which in that bill were not so fully set forth and disclosed.

The *amended* bill, after stating the citizenship and residence of the parties and the pendency of the suit at law, states:

That one Charles F. Brainard, on the 12th day of June, 1872, executed his last will and testament, by which he devised all of his property, real and personal, to his wife, Cornelia A. Brainard; that on the 18th day of July, 1879, Brainard acquired title to the premises in question; that on the 31st day of March, 1882, after the death of the said Charles F. Brainard, his widow conveyed the premises to the plaintiff, Leffert L. Buck; that Brainard died on the 13th day of May, 1881, and his widow on the 31st day of March, 1892; that the plaintiff Buck is the brother of Cornelia A. Brainard; that her husband, in his lifetime, had little or no means of support, except his salary as clerk in the Treasury Department.

That during the lifetime of Brainard, the plaintiff, Buck, who lived in the city of New York, and was a civil engineer by profession, entered into an agreement with Brainard by which he, Brainard, was to invest for Buck, in interest-bearing securities, such sums of money as Buck should from time to time send him for investment; that pending said agreement, and after the said Brainard had received from Buck considerable sums of money, they entered into a further agreement by which they were to, and did, purchase the premises in question for the sum of $6,350.00, each to pay one-half of the purchase-price of the property; that Brainard purchased the property and took the title to himself in his own name without the knowledge or consent of Buck; that at the time of the purchase he paid $2,550.00 out of

the money belonging to Buck ; that subsequently he made a further payment on the property of $1,266.00 ; that after the death of the said Charles F. Brainard the said Buck paid the sum of $1,971.82, the balance of the purchase-money due on said property.

That after the death of her husband Cornelia A. Brainard, believing that she held the legal title to the property, and in consideration that her brother, the plaintiff Buck, had paid for the same, conveyed the property to him, and she continued to reside thereon until the time of her death, when the plaintiff, Leffert L. Buck, went into possession of said property, and has ever since been, and now is, in possession thereof. That he had no knowledge that any other person or persons than himself had any other claim against the property, until the commencement of the suit at law.

That at the time of the death of the said Charles F. Brainard, he left surviving him two sisters and three brothers, so that the claim of the defendant, William H. Brainard, if sustained, would be to an undivided one-fifth of the property in question.

That the plaintiff Buck paid the entire amount of the purchase-money of said property, and that neither the said Charles F. Brainard, nor any of his heirs, paid any portion thereof.

The bill concludes with a prayer, that it should be decreed by the Court that the said land was charged with a trust in favor of the plaintiff, for the use and benefit of the said plaintiff Buck, and that such as may claim the legal title thereto may be decreed to convey the same to him. (R., p. 19.)

To this amended bill the defendant William H. Brainard demurred, which *demurrer is identical with the demurrer to their original bill*, the only difference being that the demurrer to the amended bill contains one more ground of demurrer in that the two bills state a different cause of action. (R., pp. 16–20.) *The demurrer was overruled*, whereupon the said defendant answered, admitting some and denying others of the allegations of the amended bill. (R., pp. 21–22).

This answer of the defendant William H. Brainard is under oath. In it he states (Par. 9) that he denies *not on*

*information and belief*, that the plaintiff Leffert L. Buck ever sent any money to the said Charles F. Brainard for investment—or that the said Charles F. Brainard was ever instructed to purchase, or did ever purchase, any real estate on behalf of the plaintiff Leffert L. Buck, but on the contrary, he says that the said Charles F. Brainard was a clerk in the Treasury Department as aforesaid, and having no time of his own in which to speculate in stocks and bonds, *at various times sent money to Leffert L. Buck to invest for him, the said Charles F. Brainard.*

And he further states in his answer, under oath: That he specifically *denies that any money whatever that belonged to the plaintiff Buck was ever invested in the said property by the said Charles F. Brainard.* (R., p. 23, Par. 9.)

We call attention especially to these statements in the defendant's answer, and to the fact that it is under oath, for the purpose of showing the reckless manner in which the defendant William H. Brainard interposes his defense.

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## POINTS.

I.

**If the Original and Amended Bills state different causes of action, the Appellants' remedy was, not by demurrer, but to strike the amended bill from the files.**

Jones *vs.* Van Doren, 130 U. S., 684.

II.

**The Demurrer to the Amended Bill having been overruled, it follows that if the Court shall find that the Evidence sustains the Bill, the Decree of the Court below should be affirmed; unless the Court should also find that the Court below erred in permitting the Plaintiffs to amend their Bill.**

This we submit was not error.

Story's Eq. Pl., 884.

Hardin adm. & oth. *vs.* Boyd & oth., 113 U. S., 756.

III.

**If the property in question was paid for by the plaintiff, Buck, or with money in the hands of Charles F. Brainard, belonging to said Buck, an implied or constructive trust is created by operation of law, by which the property became vested in him.**

Anderson's Law Dict., Tit. Trusts.
Perry on Trusts, Sec. 168.
Pomeroy's Eq. Jur., p. 1049.
1 Story's Eq. Jur., p. 187.
Adams' Equity, p. 36.
Mich. Ry. Co. *vs.* Mullins, 44 Mich., 321.
Johnson *vs.* Dougherty, 18 N. J. eq., 406.
Watson *vs.* Thomas, 12 R. L., 446.
McMurray *vs.* Mobley, 13 Ark., 309.
Hall *vs.* Linn, 8 Cal. 264.
Conant *vs.* Risenborough, 139 Ill., 383.
Smith *vs.* Profitt, 82 Va., 832.
Ballock *vs.* Hooper, 6 Mack., 421.
Furgeson *vs.* Williamson, 20 Ark., 272.
McDonald *vs.* McDonald, 24 Ind., 64.
Hiddon *vs.* Jordan, 21 Cal., 92.
Fallanchee *vs.* Kilbreth, 17 Ill., 522.
Brown *vs.* Dudley, 45 Me., 52.
Chastain *vs.* Smith, 30 Ga., 96.
Smith *vs.* Boquet, 27 Tex., 507.

IV.

**The plaintiff, Buck, is not chargeable with laches in not asserting his title to the premises.**

Ruckman *vs.* Corey, 129 U. S., 387.

V.

**The defendant, William H. Brainard, is not entitled to relief, neither should he be permitted to prosecute his suit at law by reason of his laches.**

Richards *vs.* Mackall, 124 U. S., 187.
Speidel *vs.* Henrici, 120 U. S., 377.

Brown *vs.* Buena Vista, 95 U. S., 806.
Crutchfield *vs.* Hewett, 2 D. C. App., 373.
Cammack *vs.* Carpenter, 3 D. C. App., 219.
Baker *vs.* Cummings, 4 D. C. App., 273.
Levis *vs.* Kengla, 8 D. C. App., 270.

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## ARGUMENT.

I.

**By an examination of the Case in Jones vs. Van Doren, *supra*, it will be seen that the proper practice was for the Appellant to have moved to strike the amended bill from the files instead of to have Demurred.**

**However, we submit that it was a proper exercise of discretion on the part of the Court below to permit the Plaintiffs to amend their bill.**

> Amendments by the plaintiff amending the bill may be useful for various purposes; for the correction of mistakes; or for the suppression of impolitic admissions in the original statements; or for adding new parties; or *for enquiring into additional facts; or for the further investigation of facts, which have been only partially disclosed;* or for putting in issue new matter stated in the answer."
>
> Story's Eq. Pl., Sec. 834.

*a.* The amendment of the bill in this case was made before answer. It worked no surprise to the defendants and they were not inconvenienced by it.

*b.* The parties to the bills are the same. The property sought to be affected by each is the same. They each pray that a trust may be declared in favor of Leffert L. Buck, upon the property in question for the reason that it was purchased with his money and that he paid for it.

*c.* Whatever difference there is, is not in matter of substance, but in the way of stating the same facts which constitute the plaintiffs' cause of action. The original bill states that the property described was paid for with money advanced by Mr. Buck. The amended states how it was advanced, that is that Brainard had money in his hands belonging to Buck, and used it in paying for the house.

*d.* Each of the bills in question proceed upon the theory that Brainard took the conveyance of the property described in the bill charged with a trust, either constructive or resulting in favor of the plaintiff Leffert L. Buck, by reason of the fact that Buck's money paid for the property.

We submit that had the case gone to a hearing on the original bill, and the plaintiffs had offered the same evidence that they did, the Court would have permitted the bill to have been amended and rendered a decree in favor of the plaintiffs.

The defendant could have had no reasonable ground to have objected, and substantial justice would have required and sanctioned it.

In 121 U. S. the court say:

> "The various matters therefore, contained in the amended bill and the original bill were thus connected with each other in such a way as fairly to bring the question of granting leave to file the amended bill within the discretion of the court below. In reviewing the exercise of that discretion on this appeal, we should not feel justified in any case in reversing the action of the Circuit Court, if it appeared that the appellants were not put to any serious disadvantage or materially prejudiced thereby."
>
> Richmond *vs.* Trous, 121 U. S., 27.

But the bill was amended in this case before any evidence had been taken, so that the defendant was not taken by surprise, and suffered far less inconvenience than he would had the bill been dismissed and the plaintiff been compelled to bring another suit.

And the Supreme Court say, in 9 How.:

> "To accomplish the object for which a court of equity was created, it has the power to adapt its proceedings to the exigency of each particular case, but this power would very often be ineffectual for the purpose unless it also possessed the additional power, after a cause was heard and a case for relief made out, but not the case disclosed by the bill, to allow an alteration of the pleadings on terms that the party not in fault would have no reasonable ground to object to. That the court has this power and can, upon hearing the cause, if unable to do complete justice by reason of defective pleadings, permit amendments, both of bills and answers, is sustained by the authoritities."
>
> Neale *vs.* Neales, 9 How., 1.

Justice Harlan says, in Hardin *vs.* Boyd, 113 U. S., 756:

> "If the bill be found defective in its prayer for relief, or improper parties, *or in the omission of statement of facts or circumstances connected with the substance of the case*, but not forming the substance itself, the amendment is usually granted."

In Jones *vs.* Van Doran, 130 U. S. 684, the bill alleged that a widow conveyed her dower upon an express trust, and the bill was permitted to be amended by alleging that she was induced to make the conveyance by fraudulent misrepresentations.

The court say by Mr. Justice Gray:

> "The only difference between the amended and original bills is that the first alleges that the defendant Jones took the conveyance of the plaintiff's right of dower upon an express trust for her, whereas, the second alleges that he procured the conveyance from her by fraudulent misrepresentations as to the nature of the instrument, creating a trust by operation of law in her favor. The other facts alleged in the two bills are subtantially identical. Each bill proceeds upon

the ground that the defendant Jones was a trustee for the plaintiffs, and that the defendant Van Doran, taking the land from him with notice of all the facts, was affected by the trust; and the object of both bills is the same to obtain the right of dower of which the plaintiff has been deprived by the acts of the defendants, and to which she was entitled under the laws of Minnesota in force at the time of her husband's death. The amendment was therefore one which the court in the exercise of its discretion might properly allow, and the motion to strike the amended bill from the files was rightly denied."

Harding *vs.* Boyd, 113 U. S., 756.

## II.

It will be seen that no claim is made on the part of the appellants that any of the heirs of Charles F. Brainard ever paid anything on account of the purchase of the property in question. Neither is it claimed that Charles F. Brainard, in his lifetime or his widow in her lifetime, were ever under any obligations to the heirs of Charles F. Brainard for any aid, assistance or support given them.

Their claim is based solely because of a mistake made by Charles F. Brainard and his wife and the plaintiff Leffert L. Buck, in supposing that the title of this property was conveyed by the last will of Charles F. Brainard, conveying all his property, real and personal, to his wife. After the lapse of many years some person discovered that the property in question was purchased after the execution of the will, and for that reason it did not convey to the wife this property, as it was "after acquired" property.

The defendant, William H. Brainard, upon being urged at great length on cross-examination to tell from whom he received the knowledge of his right to claim title to any portion of the property, or when he received it, and whether or not he had entered into an agreement with any one regarding compensation for the prosecution of this suit, to be paid out of the property, did not give any excuse or reason for his long delay in asserting title to the property.

The object of this cross-examination, to the extent it was conducted, was for the purpose of testing the good faith of the defendant in asserting title to the property in question, and was in the light of the decisions of the Supreme Court of the United States, and particularly the case of Speidel *vs.* Henrici, 120 U. S., 387, where the Court says:

> "Independent of any Statute of Limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and *shows no excuse for his laches* in asserting them. * * * Nothing can call forth this Court into activity but *conscience, good faith and reasonable diligence shown.* Where these are wanting the Court is passive and does nothing."

The same language is used by the Court in the case of Sullivan *vs.* Portland & C. R. R. Co., 94 U. S., 812.

This testimony of the defendant on his cross-examination showed that he had no right merely as a matter of right between the parties to assert any claim to this property. He had never paid anything for it, and there were no financial relations existing between him and Charles F. Brainard which gave him reason to suppose that Brainard was under obligations to him.

He had known since the death of Charles F. Brainard, or is presumed to have known,—a period of nearly seventeen (17) years,—that the grantees, or those taking under Brainard's will, were in possession of the property. He had permitted Mr. Buck after he had come into possession to dispose of all the personal estate without protest, and to pay upwards of $1,900.00 of an indebtedness for the purchase-money of the property, and we submit that it was his duty to have told frankly and honestly all he knew regarding it, before he could ask a court of equity to give him relief.

But, however this may be, the evidence we submit proves, beyond question, that the property was paid for by Mr. Buck, or by money belonging to him in the hands of Charles F. Brainard, in his lifetime.

Mr. Buck, in his evidence, gives a frank and honest statement of all he knows regarding the transaction. He is a man of character, standing high in his profession, and

a man who has made money, and had money to invest. He was a member of the Inter-Continental Railroad, Commission; he as civil engineer rebuilt the old suspension bridge at Niagara Falls, as he has testified, and bought the property in question for the purpose of giving a home to his sister, who was the wife of Charles F. Brainard.

He testified, in his testimony (R., 27–28):

> "I was preparing to go to Peru, South America, to work at my profession. Previous to going, I had a little money, which I requested Mr. Brainard to take and invest for me, as my agent, telling him that from time to time, as I had money for him to invest for me, I would send it to him for that purpose. While I was there, I continued to send him money, as I had it to spare, for investment, and he continued to invest it." (R., pp. 27, 28.)

He further testified that he continued to send him money after his return home.

He testified (R., p. 28):

> "About 1878, as I had no settled home, I suggested to him that we buy a house together, on shares, for my part as headquarters, and to be a home for himself and wife. (R., p. 28.)

That he was unmarried at that time and has remained so since. That they finally bought, in pursuance to this arrangement, the premises in question, 1632 R. I. Ave., for $6,350.00. (R., p. 28.)

Mr. Brainard was ill at this time, and had no children, and he had made his will giving all his property to his wife, and he had informed Mr. Buck that at his death all the property would go to her. Mr. Buck testified:

> "He said that in any event, if he should be taken away, the property would all go to his wife, all he had; and he also gave me a statement of the transactions which he had and I had in regard to the money."
>
> Q. "Was that statement in writing?
>
> A. "It was in his own handwriting.
>
> Q. "And have you that statement?" (R., p. 29.)

The statement was subsequently in the course of his examination produced and offered in evidence. This statement is Exhibit A. (R., pp. 73–74.)

It does not appear at what time particularly it was given to Mr. Buck, but it was after the purchase of the property, and as Mr. Brainard died in 1881, it was some time between the purchase of the property in 1879 and the date of his death, and it shows the amount of money that Mr. Buck had put into the property, or that Mr. Brainard had put into the property for Mr. Buck, of his money at that time.

He had Mr. Buck's money. He had been disappointed in obtaining money to put into the property himself. The business association in which he had his money had failed. He then desired an understanding with Mr. Buck regarding their relative positions as to this property, and he gave him this statement, which is in part as follows:

> "Mend. of basis for settlement:
> Cost of property 1632 R. I. Ave.....$6,350.00
> One-half cost of property..... ..... 3,175.00
> Leffert L. Buck has paid on account of this property..... ..... ..... 3,816.66
> Cost of one-half of property..... ... 3,175.00
>
> Amt. due Leffert L. Buck, acct. purchase. $641.66"
> (R., p. 69.)

This is his statement in writing to Mr. Buck, showing the amount paid by him out of Mr. Buck's money on account of this property.

Add to this amount of $3,816.66 the sum of $1,971.82, which he testifies (R., p. 32) he paid on the house, after Mr. Brainard's death, and at the time of the conveyance to him by Mrs. Brainard.

> "I sent $2,000.00 to her in New York in the form of a certificate of deposit on the American Exchange National Bank of New York, to finish paying for the house."

And he produced in evidence the certificate of deposit with the endosements on it of himself and Mrs. Brainard. (R., p. 37.)

> "Leffert L. Buck has deposited in the American National Exchange Bank $2,000.00, payable to the order of himself, on return of this certificate properly endorsed."

The date is March 17th, 1882.

The amount of the mortgage was not quite as much as $2,000.00, but was $1,972.81. (R., pp. 38–39.)

Add to this sum $3,816.86, and it shows that he had paid at that time $5,789.47 out of Mr. Buck's money, which, deducted from $6,350.00, the amount of the purchase-money of the property, left to be accounted for as having been paid by him out of his money, the sum of $560.53.

For the purpose of showing to the Court that this balance was paid out of money belonging to Mr. Buck, the plaintiffs offered in evidence a private account book, kept by Mr. Brainard, in his lifetime, of his dealings and transactions with Mr. Buck, and this book shows, that he had in his hands over and above the amount covered by this statement, and by the certificate of deposit the sum of $793.83 of Mr. Buck's money, which he charges himself with on the book as being money belonging to Mr. Buck, and used by him in making payments on the house. (See Book.)

It is evident Mr. Brainard had no means outside of his salary, for Mr. Buck testified that after Mr. Brainard's death, he paid the undertaker's bill and took the remains to Canton, New York, and buried them in his family lot and that he also paid Mr. Brainard's doctor's bill. (R., pp. 29–30.)

Some objection has been made on the part of the defendant that this book shows that money had been sent by Mr. Brainard to New York to Mr. Buck to invest for him, and the defense went to considerable expense for the purpose of showing that the entries of Dr. and Cr. were reversed in their order on the page of the book from what they deemed a proper course of bookkeeping. They claimed

that this fact alone proved this to be true. This is hardly worthy of attention.

Brainard was a man living on a salary of $150.00 a month. At least one-half of this he would have to expend in his living, which would leave him $75.00 a month.

And the defense would have us believe that, with this sum of money, for the evidence in the case does not disclose that he had anything but his salary, he sent during the year 1879, while he was in ill health, to Mr. Buck, to invest for him, the sum of $2,836.49; and between the months of January, 1880, and May, 1880, upwards of $1,000.00.

The book of account shows that this money was received by Mr. Brainard, and his entry is March 12:

"To cash received, $220.00."

And all the entries were of "cash received."

If Mr. Brainard had been sending to Mr. Buck cash to invest for him he certainly would not have entered it as "cash received." The book would show that he sent the money to Mr. Buck to invest for him.

And again, they claim, the book shows that some of this money was sent to New York to be invested in D. C. bonds. Why Mr. Brainard should be buying bonds of the District of Columbia in New York city is not explained.

As we say, that it should be claimed on the part of the defense that this evidence proves that Mr. Brainard sent Mr. Buck this money to invest for him, would be in the face of Mr. Buck's testimony hardly worthy of consideration. He testified on this point as follows:

> Q. "And this contains an itemized statement of the moneys given by you to him, and of the dates when he received it?
>
> A. "I suppose they are the dates when he received it, they are the dates that are put down there.
>
> Q. "State whether or not Mr. Brainard ever paid you any money?
>
> A. "There is about $60.00 there. I think it is. I don't remember the exact sum, but it is about $60.00, that he has put down there as paying me. That is all I know of." (R., p. 59.)

In support of the theory of the defense that Mr. Brainard sent this money to Mr. Buck, to be invested, they produced two witnesses as experts, one a young man in Fisher & Co.'s office, and Mr. E. B. Hay. (R., pp. 51–55.)

To rebut this testimony, the plaintiff presented three witnesses, each of them men of age, character and experience, acquainted with Mr. Brainard, in his lifetime, knowing his habits of business, and his manner of keeping books, each of whom testified that in their opinion, it showed the money was received by Mr. Brainard from Mr. Buck. This clearly contradicted and rebutted the theory of the defense that the moneys were sent by Mr. Brainard to Mr. Buck. (R., pp. 61–73.)

And having shown from the evidence that Mr. Buck's money paid for this property, we come to the *third* point, namely:

III.

**That having paid for it an implied or constructive trust is created by operation of law, by which the title to the property in question became vested in him.**

There are two kinds of trust—resulting, and implied or constructive trusts. Constructive trusts are divided by elementary writers into three classes, to be determined according to the circumstances in which they arise.

1. Trusts that arise from actual fraud.
2. Trusts that arise from constructive fraud.
3. Trusts that arise from some equitable principle independent of the existence of any fraud.

Perry on Trusts, Sec. 168.

Bouvier, in his Law Dictionary, Title "Constructive," defines the word:

> "That which amounts in the view of the law to an act, although the act itself is not really performed."

In the case at bar, Mr. Buck paid for this property, and he should have the title. He, having paid for it with his

money, equity will carry into effect the acts themselves which were in good faith performed, and perfect the title to the property which he has paid for, in him.

Anderson, in his Law Dictionary, defines "Constructive Trusts" to be:

> "Such trusts as are imposed by construction of law, from reasons of equity and justice, independent of the intentions of the parties. A trust which arises from actual or legal fraud, as when the person occupying a fiduciary position, gains an advantage to himself, personally."
>
> Anderson's Law Dict., Tit. Trusts.

In Pomeroy's Equity Jurisprudence, it is said:

> "Another form of the trust arises in the case of a person who personally receives some benefit while standing in some fiduciary relation. The doctrine is of wide application, and extends to * * * agents using the money of their principal." * * *
>
> Pomeroy's Eq. Jur., Sec. 1049.

In Adam's Equity it is said that:

> "A constructive trust is a trust created by operation of law arising from the relation in which the parties are to each other, as principal and agent."

The evidence shows that Mr. Brainard was Mr. Buck's agent for the purpose of investing this money. (R., p. 28.) That as his agent he invested it in the property in question. (See Book.) That he took the title to himself, without Mr. Buck's knowledge or consent. (R., pp. 28, 29.)

That he held the money as his agent appears from the statement which he gave Mr. Buck.

That he paid this money for the property in question also appears from his statement and his private book of account, which has been offered in evidence. (R., p. 70.)

That the relation of principal and agent existed between them, and that while this relation existed, his taking the property in his own name, and paying for it out of the moneys bolonging to Mr. Buck, shows that he was guilty, if not of a moral fraud, of a constructive fraud.

Story defines fraud to be:

> "Fraud, in the sense of equity, properly includes all acts of omissions or concealments, which involves a breach of legal or equitable duty, trust or confidence."

This doctrine has received the interpretation of the courts in numerous cases.

Johnson *vs.* Dougherty, 18 N. J., Eq., 406.
Mich. Ry. *vs.* Mulligan, 44 Mich., 321.
Watson *vs.* Adams, 12 R. I., 466.
McMurray *vs.* Mobley, 13 Ark., 309, and cases heretofore cited.

I would further state that Charles F. Brainard, under the facts of this case, was not the debtor of L. L. Buck, but he was the custodian of funds placed in his hands by said Buck for purposes of investment, and was, therefore, the personal representative of said Buck in the management of said funds, and stood in a fiduciary relation to said Buck concerning the same. The funds which he received from said Buck were impressed with a trust, and when said funds were invested in the real estate in question, said real estate became impressed with a trust, and when said Buck learned that his funds had been invested in real estate, the legal title to which was in the said Brainard, his trustee, then he had a right to make his election as to whether he would demand the legal title to said real estate or no, since his funds had been invested in the same.

In the case of Bibb *vs.* Hunter, 79th Alabama, 352, 361, the Court, quoting Chancellor Kent, states the rule of law applicable to simple resultings trusts, then says: "This rule must be understood as referring to simple resulting trusts, as distinguished from investments of trust funds by trustees,

or other persons acting in a representative or fiduciary capacity."

Felix *vs.* Patrick, 145 U. S., 317, 328.
Day *vs.* Roth, 18 N. Y., 453.
1 Spence, 509, 511.
2 Pom. Eq. Jur., Sec. 1030.
Overseers of the Poor *vs.* Bank of Va., 2 Gratt, 544.

"The right or option of the *cestui que* trust is one which positively and exclusively belongs to him, and it is not in the power of the trustee to deprive him of it by any subsequent repurchase of the trust property," etc.

Oliver *vs.* Piatt, 3 Howard, 333, 401.

"If an agent to collect money puts the money collected into a chest where he has money of his own, he does not thereby make it all his own, and convert himself into a mere debtor of his principal."

F. & M. National Bank *vs.* King, 57 Pa. State, 202, 208.

The principle of equity jurisprudence upon which the appellee relies for redress is clearly stated, we think, in the following quotation:

"There are two principles upon which a court of equity acts in exercising its remedial jurisdiction. * * * One is that it will not permit the Statute of Frauds to be used as an instrument of fraud, and the other, that when a person, through the influence of a confidential relation, acquires title to property, or obtains an advantage which he can not conscientiously retain, the court, to prevent the abuse of confidence, will grant relief." 169 U.S. 398, 405

Mr. Charles F. Brainard's account book shows that he kept Mr. Buck's funds separate and apart from his own, and that on the 18th day of July, 1879 (Rec., middle of page 10), he took from Mr. Buck's funds the sum of $2,550.00,

and invested the same in the house and lot in question; and on March 12, 1880 (Rec., near top of page 11), he again used of Mr. Buck's money the sum of $1,266.66 in making a further payment on said house and lot. On June 8th, 1880, Mr. Brainard still retained of Mr. Buck's money (Rec., page 11), the sum of $793.58. On said date last mentioned it will be observed, as shown by Mr. Brainard's account book, that he had invested in said real estate and retained in his possession, funds belonging to said Buck, in the amount of the sums above set forth; that is to say, $4,610.24. Mr. Charles F. Brainard died in May, 1881 (Rec., page 27). Mr. Buck, through his sister, Mrs. Charles F. Brainard, March 17, 1882 (Rec., bottom of page 38 and top of page 39), made a further payment on said real estate of $1,972.81. Therefore, it will be observed that the said Charles F. Brainard had, for investment in said property, funds belonging to Mr. Buck, in the said amount of $4,610.24, and that the said Buck invested in said property the further sum of $1,972.81 after the death of said Brainard. The property, therefore, cost Mr. Buck the amount of the two sums last named, to wit, $6,583.05. Deduct from this the amount that the said Brainard agreed to pay for the property in question, to wit, $6,350.00, and there remains a balance of $233.05. The property in question consequently cost Mr. Buck in moneys advanced by him nearly twenty years ago $233.05 more than the price which Mr. Charles F. Brainard agreed to pay for the same.

IV.

**It cannot be claimed in this case that the plaintiff, Mr. Buck, is chargeable with laches in not asserting his title to the property in question at the time of the death of Mr. Brainard, or at the time of the conveyance to him by Mr. Brainard.**

The Supreme Court say:

> "Where the possession has been peaceable possession of the property for several years prior to the assertion of title against him, he need not take steps to establish his title."

Quoting the case of Mills *vs.* Lockwood, 42 Ill., 111, they say:

> "Laches, we submit, in a court of law as well as a court of equity, cannot be imputed to one in the peaceful possession of land, for delay in resorting to a court of equity, on account of a mistake in the description of the premises in one of the conveyances through which the title must be deduced. The possession is notice to all of the possessor's rights and he need not assert them only when he may have occasion for it."
>
> Ruckman *vs.* Corey, 129 U. S., 397.

V.

**The defendant, William H. Brainard, we submit, is not entitled to relief; neither should he be permitted to prosecute his suit at law by reason of his long delay in asserting his title.**

Mr. Brainard died in May, 1881. (R., p. 27.) William H. Brainard, the defendant in this action, began his suit at law in July, 1897. He permitted a period of sixteen years and three months to elapse before making any claim of title whatever to this property. And as we have said, he also permitted the plaintiff in this suit, Mr. Buck, to make a payment of $1,971.82 on the property, after Mr. Brainard's death, and only claims a right to the property by reason of the fact that there was a mistake made by Charles F. Brainard, in not republishing his will after the purchase of the property.

The Supreme Court say by Mr. Justice Harlan, in Richards *vs.* Mackall, 124 U. S., where the plaintiff claims his right to the property after nearly twelve years had elapsed:

> "After the property has largely increased in value, and after sleeping upon his rights for nearly twelve years, with information during the whole of that period, of every fact now relied upon by him, he comes into a court of equity, and asks it to adjudge him to be the owner of the property, and only because of the mistake of the officer in not so describing the premises,

in the advertisement of sale, and in the conveyance as to properly identify them. In our judgment, he is not entitled to claim the interference of a court of equity."

In this case it would seem particularly inequitable to permit the defendant to assert claim to this property, after the lapse of nearly seventeen years, and after all the witnesses to the transaction, who knew of the facts connected with it, have passed away. Mrs. Brainard has died. The building association in which Mr. Brainard invested his money have failed, and their books have been lost or destroyed.

The Court of Appeals of the District of Columbia say in a case similar to the one at bar:

> "And apart from all grounds and considerations in support of the demurrer to the bill, the laches or lapse of time would seem to furnish a complete bar to the relief sought in this action. Mrs. Lane and Mr. Carpenter are both dead. * * * It is well settled that laches and undue lapse of time constitute a good defense in equity and one that may be availed of in support of the bill."
>
> Cammack *vs.* Carpenter, 3 D. C. App., 219.

It is respectfully submitted that the decree of the Court below should be affirmed.

JAMES COLEMAN,
*Solicitor for Complainant Leffert L. Buck.*

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NOTE.—Two mistakes occur in the printed Record, which counsel for the Appellants have agreed may be corrected on the hearing. The words, "This money was paid TO me by Mr. Brainard," should read "this money was paid BY me to Mr. Brainard" (Rec., p. 59), and in the top line on p. 60, of the Rec., the word settlement should read *statement*.

No. 110.

Brf. of Brookshire for Appellees

FILED
JAN 14 1902
JAMES H. McKENNEY,
Clerk.

Filed Jan. 14, 1902.

# Supreme Court of the United States.

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## October Term, 1901.

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WILLIAM H. BRAINARD, EDWARD ALBERT BRAINARD and EVA HANMORE, Appellants,

*vs.*

LEFFERT L. BUCK *et al.*, Appellees.

No. 110.

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# Brief of Nelson L. Robinson, for Appellees.

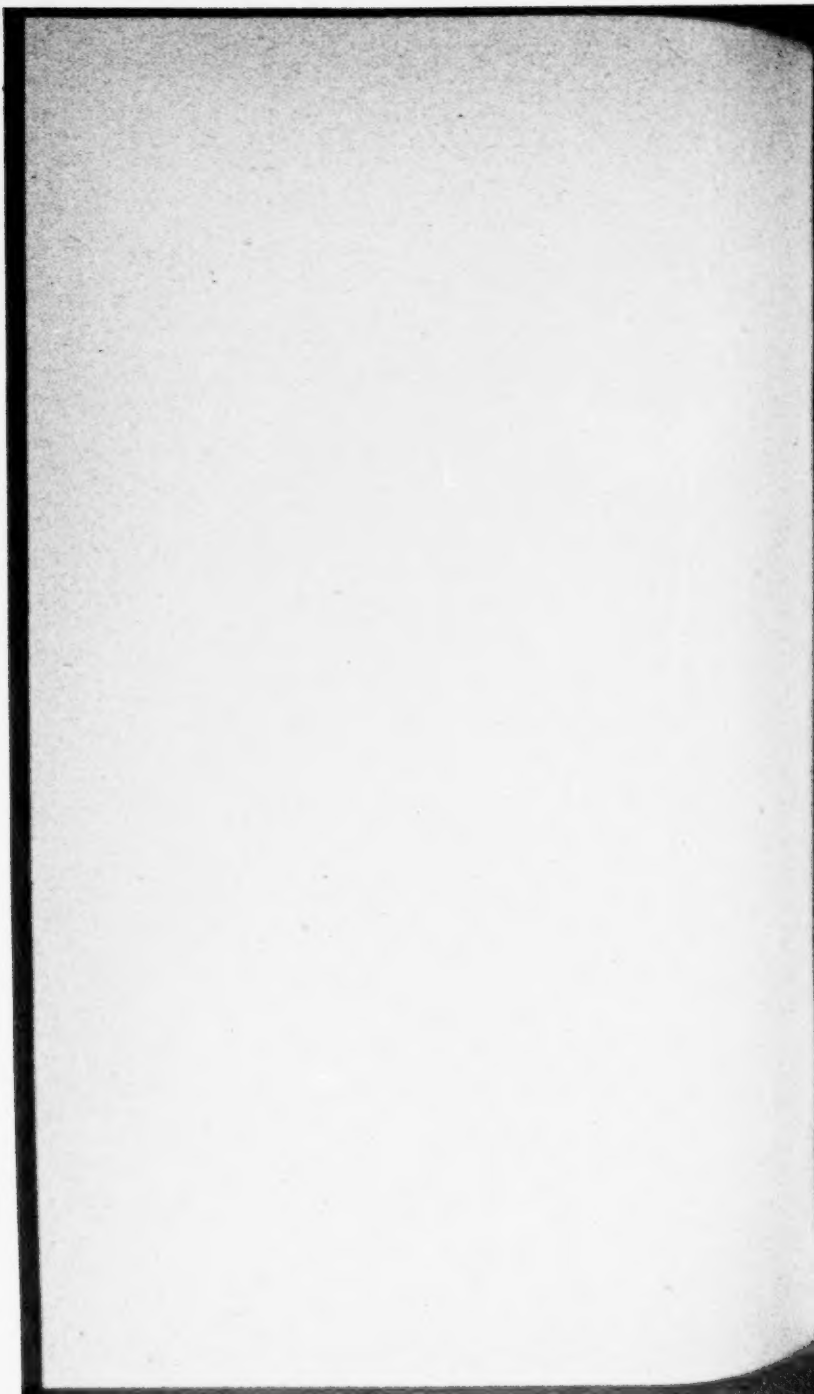
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E. V. Brookshire

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PRESS OF BYRON S. ADAMS.

(17,837.)



# Supreme Court of the United States.

October Term, 1901.

WILLIAM H. BRAINARD, EDWARD ALBERT BRAINARD and EVA HANMORE, Appellants,

*vs.*

LEFFERT L. BUCK *et al.*, Appellees.

No. 110.

## Brief of Nelson L. Robinson for Appellees.

### STATEMENT OF FACTS.

The complainant below, Leffert L. Buck, a citizen of New York, was a brother-in-law of the deceased Charles F. Brainard, through whom as an heir at law the appellant, William H. Brainard, claims an interest in the real property at No. 1632 Rhode Island avenue in the city of Washington, which is the subject-matter of this suit. In 1875, when about to go to South America to reside, Mr. Buck began to send money in various sums to Mr. Charles F. Brainard, as his agent, for investment. (*Record, pp. 27, 28; Exhibit A,* * *pp. 9–11, 73–75.*) After his return to New York in 1876 Mr. Buck continued this practice. With the money thus furnished by Mr. Buck Mr. Brainard bought United

* Wherever "Exhibit A" is mentioned in this brief, pages 2, 3, 4 and 5 of Mr. Brainard's account book, (*Record, pp. 9–11,*) are meant.

States and District of Columbia bonds, selling the same and investing in others as the market seemed favorable, and collecting the interest thereon; and in July, 1879, he had in his possession money and bonds belonging to Mr. Buck to the amount of upwards of $2,600. Mr. Brainard was a clerk in the U. S. Treasury, dependent upon his salary for his support, and had no home of his own. Shortly before the purchase of the property in question, Mr. Buck, who wished to provide a home for his sister, Mrs. Brainard, as well as headquarters in Washington for himself, suggested that Mr. Brainard and he should buy a house together, and that each should pay one-half of the purchase money. (*Record, pp. 28, 29.*) Mr. Brainard orally assented to this proposal, which was not in writing; but the proposal as thus made and assented to was never acted upon. Instead, on July 18, 1879, Mr. Brainard sold bonds belonging to Mr. Buck to the amount of $2,553.37, and on the same day bought the property at No. 1632 Rhode Island avenue for $6,350, of which he paid down $2,550 out of Mr. Buck's money then in his hands, proceeds of the sale of the bonds. (*Record, Exhibit A and Mr. Brainard's written statement of the transaction, pp. 73–75.*) Without Mr. Buck's knowledge or authority from him Mr. Brainard took a deed of the property in his own name and gave a trust deed thereon to secure three notes made by himself for $1,266.66 each, the balance of the purchase price. (*Record, pp. 5, 6, 28, 29.*) He then moved into the house. Mr. Buck continued to send him money from time to time as before, and March 12, 1880, he paid the first of the three notes with money received from Mr. Buck. Mr. Brainard kept a careful record of these transactions in his private book of accounts, on one side of which he credited Mr. Buck with the amounts received from him, with proceeds of the sale of bonds and with interest collected, while on the other side he charged Mr. Buck with all payments made on the house, including payments for insurance and repairs and *for recording the deed of the property.* This account closes with entries in June, 1880, when Mr. Brainard still had an unexpended balance of Mr. Buck's money, amounting to $793.58. This book was found among Mr.

Brainard's effects after his death, and shows conclusively that Mr. Brainard understood that Mr. Buck was the real owner of the house and that he held the title as trustee for Mr. Buck. He had not paid one penny of the purchase money himself. At this time Mr. Brainard was suffering from the disease of which he afterwards died May 13, 1881. At some time early in 1880 Mr. Brainard informed Mr. Buck that he had taken the deed in his own name, and during the summer of that year he rendered him a written account of their transactions, agreeing with the entries in his book, and showing the balance of $793.58 still in his hands. (*Record, pp. 28, 29, 58, 73–75.*) At the same time he offered in writing to give Mr. Buck his note for the surplus over one-half the cost of the house paid by Mr. Buck and to pay Mr. Buck interest and rent. (*Record, pp. 29, 73.*) Naturally, Mr. Buck refused this offer and told Mr. Brainard that he would pay the amount unpaid on the property if Mr. Brainard would deed it to him. Mr. Brainard then said he hoped to get well and, if he did, that he would like to pay for the whole of the property and own it; and that in any event it would go to his wife, Mr. Buck's sister, at his death; that all his property would go to her. (*Record, pp. 29, 30.*) Mr. Buck was willing that the property should become his sister's and, relying upon Mr. Brainard's assurance that it would go to her and because of Mr. Brainard's serious illness, said no more to him about the matter. Mr. Brainard gave no note and paid no interest nor rent to Mr. Buck, but continued to live in the house until his death. (*Record, p. 60.*) Before the purchase of the property Mr. Brainard had made a will, which was admitted to probate in 1881, leaving all his property both real and personal to Mrs. Brainard. (*Record, p. 5.*) After her husband's death Mrs. Brainard informed her brother, Mr. Buck, that she had the legal title to the house under the will, and upon her executing a conveyance of the property to him he sent her $2,000, out of which she paid on March 17, 1882, the balance of the purchase money secured by the trust deed, $1,972.81, and obtained a discharge of the trust deed. (*Record, pp. 32, 33, 34, 37, 38, 39.*)

It appears by documentary evidence, *i. e.*, Mr. Brainard's

account book and the written statements given by him to Mr. Buck, and the draft for the last payment with the memorandum attached, that the following payments on the house were made with Mr. Buck's money:

| | | |
|---|---|---|
| 1879, July 18, | $2,550.00 | |
| 1880, Mch. 12, | 1,266.66 | Cost of house $6,350.00 |
| 1882, Mch. 17, | 1,972.81 | 5,789.47 |
| Total | $5,789.47 | $560.53 |

Leaving $560.53 paid between the date of the last entry on Mr. Brainard's statement of account and the date of the last payment of $1,972.81, as to which the only evidence that the payment was made with Mr. Buck's money is the fact that Mr. Brainard still had, when he rendered the account, an unexpended balance of $793.58 cash belonging to Mr. Buck, which was never repaid to Mr. Buck. (*Record, p. 33.*)

The account book contains entries of payments made by Brainard to various loan associations before his death, which perhaps account for this $560.53 and the interest on the trust deed. In view of the fact that all the other payments were made with Mr. Buck's money, it would not be a difficult presumption to hold that these payments were made out of the $793.58; but under counsel's theory of the law governing the case, as will hereafter appear, it is not necessary to determine this question. Furthermore, none of the payments to building associations, except possibly those to the Western association, is in any manner connected with the house transaction.

Mrs. Brainard lived in the house without paying rent, and partially supported by her brother, Mr. Buck, until her death, March 31, 1892; and thereafter Mr. Buck remained in undisturbed possession of the property until July, 1897, more than sixteen years after Mr. Brainard's death, when the appellant William H. Brainard brought an action of ejectment on the law side of the court below against Mr. Buck and the appellee, Mr. Coleman, who is a lessee under Mr. Buck, to recover possession of an undivided one-third of the property with damages for withholding the same.

It should be observed that Mr. Charles F. Brainard left no descendants: His heirs at law are his sisters, Mrs. Caroline Farrar and Mrs. Frances Peck; a brother, the appellant William H. Brainard; a niece, Mrs. Mary E. Day, and a nephew, the appellant, Edward Albert Brainard. The niece and nephew are children of different deceased brothers. Hence, the appellant, William H. Brainard, is an heir at law of only one-fifth of Mr. Charles F. Brainard's estate, though in his action at law he claimed one-third. Mrs. Farrar, Mrs. Peck, and Mrs. Day quit-claimed the property to Mr. Buck after the beginning of the action at law and before the filing of the bill in this action, which was brought to quiet Mr. Buck's title and to restrain the appellant, William H. Brainard, from further prosecuting his action at law. The appellant, Edward Albert Brainard, is a minor and could not quit-claim; the appellant, Eva Hanmore, is his mother, and the widow of a deceased brother of Mr. Charles F. Brainard.

The Supreme Court of the District of Columbia rendered a decree in favor of the appellees, which was affirmed on appeal by the Court of Appeals of the District. From the judgment of affirmance the present appeal was taken.

## POINTS.

I.

**When Mr. Charles F. Brainard, acting in a fiduciary capacity as the trusted business adviser and agent for the purpose of making investments of Mr. Buck, invested Mr. Buck's money in the property in question and, paying nothing himself, took the title in his own name without Mr. Buck's knowledge, a constructive trust arose and he took the title as trustee for Mr. Buck.**

Witts *vs.* Horney, 59 Md., 584.
Keller *vs.* Keller, 45 Md., 270.
Crocker *vs.* Crocker, 31 N. Y., 507.
Moffatt *vs.* Shepard, 2 Penn., 66.
Depeyster *vs.* Gould, 3 N. J. Eq., 474.

Hall *vs.* Sprigg, 7 Mart. O. S., 243.
Rose *vs.* Hayden, 36 Kan., 106.
Burden *vs.* Sheridan, 36 Iowa, 125.
Phillips *vs.* Crammond, 2 Wash. C. C., 441.
2 Story, Eq. Jur. (13th ed.), Sects. 1201, 1211a, 1265, and cases cited.
2 Pom. Eq., Sec. 1037, and cases cited.
Greenleaf's Cruise on Real Prop., I., pp. 372, 392.
Ryall *vs.* Ryall, Amb. Rep., 413.
Lane *vs.* Dighton, *Id.*, 409.
Prevost *vs.* Gratz, 1 Pet. C. C., 364.

II.

**Where a trustee or other person standing in a fiduciary capacity makes a profit out of any transaction within the scope of his agency or authority, that profit will belong to the cestui que trust. In cases of this sort the cestui que trust is not bound at all by the act of the other party. He has, therefore, an option to insist upon taking the property; or he may disclaim title thereto and proceed upon any other remedies to which he is entitled, either in rem or in personam.**

Story's Eq. Jur., (13 ed.,) Secs. 1261–2, and cases cited.
Day *vs.* Roth, 18 N. Y., 448.

III.

**The appellants are estopped from claiming that the title to the property did not pass under Mr. Brainard's will to Mrs. Brainard and under the deed from her to Mr. Buck.**

Mfrs. Bank *vs.* Hazard, 30 N. Y., 226.
Blair *vs.* Wait, 69 N. Y., 113.
Continental Nat. Bk. *vs.* Nat. Bk., 50 N. Y., 575.
Voorhis *vs.* Olmstead, 66 N. Y., 113.

IV.

**The appellees have not been guilty of laches.**

18 Am. and Eng. Ency. of Law, (2 ed.) Title, Laches, Subdiv. VII, 7, page 125, and cases cited.
Townsend *vs.* Vanderwerker, 160 U. S., 176.
Ruckman *vs.* Cory, 129 U. S., 387.
Stedman *vs.* Davis, 93 N. Y., 32.

V.

**The original and the amended bills were neither repugnant nor contradictory. And if the amended bill is defective in any point, it should be amended in furtherance of justice to conform to the facts proved.**

1 Barbour's Chanc. Pr. (2 rev. ed.) p. 217, and cases cited.
Jones *vs.* Van Doren, 130 U. S., 684.

VI.

**The decree was just and equitable and should be affirmed with costs.**

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## ARGUMENT.

The principles upon which the decree was rendered are elementary principles of equity jurisprudence, as ancient and well known as the history of this branch of law. Citasions in support of them could be multiplied indefinitely, but it is unnecessary to add to the text-books and cases cited by Mr. Coleman. Counsel will merely call attention to the following :

I.

**When Mr. Charles F. Brainard, acting in a fiduciary capacity as the trusted business adviser and agent for the purpose of making investments of Mr. Buck, invested Mr. Buck's money in the property in question, and, paying nothing himself, took the title in his own name, without Mr. Buck's knowledge, a constructive trust arose and he held the title as trustee for Mr. Buck.**

(*a*) If an agent invests his principal's money in land and

takes a deed in his own name, with or without the principal's consent, a trust will arise.

Witts *vs.* Horney, 59 Md., 584.
Keller *vs.* Keller, 45 Md., 270.
Crocker *vs.* Crocker, 31 N. Y., 507.
Moffatt *vs.* Shepard, 2 Penn., 66.
Depeyster *vs.* Gould, 3 N. J. Eq., 474.
Hall *vs.* Sprigg, 7 Mart. O. S., 243.
Rose *vs.* Hayden, 35 Kan., 106.
Burden *vs.* Sheridan, 36 Iowa, 125.
2 Pom. Eq., Sec. 1037.

Where a purchaser buys with trust money lands and takes the deed to himself, he who is entitled to the money may follow the same and consider the purchase made for his own use and the purchaser as his trustee.

Phillips *vs.* Crammond, 2 Wash. C. C., 441.

> "The clear result of all the cases, without a single exception, is (as has been said by an eminent judge) that the trust of the legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchaser and others jointly, or in the names of the others without the purchaser; whether jointly or severally (*successive*), results to the man who advances the purchase money."
>
> 2 Story's Eq. Jur. (13th ed)., Sects. 1201, 1211a, 1265, and cases cited.

If such be the law as to resulting trusts, the same conclusion will inevitably be reached where the trust is constructive, founded upon a legal fraud, as in the case at bar.

(*b*) The evidence that Mr. Brainard used Mr. Buck's money to make the payments on the house is as direct and conclusive as evidence well can be. It consists of Mr. Brainard's signed written statements delivered by him to Mr. Buck, and a private book of accounts kept by Mr. Brainard and found among his papers after his death. The argument of appellants' counsel that these papers show payment by Mr. Buck out of moneys advanced by Mr. Brainard is too absurd to require comment.

Evidence of a resulting trust (and *a fortiori* of a constructive trust) may be deduced from a memorandum or note of the nominal purchaser, or from papers left by him and discovered after his death.

Greenleaf's Cruise on Real Prop., 1, pp. 372, 392.
Ryall *vs.* Ryall, Amb. Rep., 413.
Lane *vs.* Dighton, *Id.*, 409.

Where the grantee of land had in an account between him and the grantor, made out subsequently to the deed, given the grantor credit for the proceeds of a part of the land conveyed by the deed, this amounts to a declaration of trust and repels the idea that the conveyance was absolute.

Prevost *vs.* Gratz, 1 Pet. C. C., 364.

(c) In this connection it should be remarked that only those entries in Mr. Brainard's book, which are part of the account with Mr. Buck, or can be connected with the purchase of the house, are competent evidence in this suit.

The same rule prevails as to the declarations of Mr. Charles F. Brainard testified to by the appellant, William H. Brainard. They were made to a third party, and are also incompetent on the ground that they are merely hearsay and were made subsequently to the transactions referred to, in so far as that is the case. Most of these declarations, however, were made before the purchase, to the effect that Mr. Brainard intended to buy a house, and were immaterial as well as incompetent.

The complainants' case was established at every point by documentary evidence, consisting of the admissions in the answer, the account book kept by Mr. Brainard, the written statement furnished by him to Mr. Buck, the certificate of deposit for $2,000 with which the last payment on the house was made after Mr. Brainard's death, the deeds of the property, and the will of Mr. Brainard.

The proofs offered by the appellants failed to support the answer. When scrutinized, it will be observed that the deposition of William H. Brainard was wholly hearsay and in great part incompetent as well as irrelevant to the issues.

II.

**Where a trustee or other person standing in a fiduciary capacity makes a profit out of any transaction within the scope of his agency or authority, that profit will belong to the cestui que trust. In cases of this sort the cestui que trust is not bound at all by the act of the other party. He has, therefore, an option to insist upon taking the property, or he may disclaim title thereto and proceed upon any other remedies to which he is entitled, either in rem or in personam.**

Story's Eq. Jur., (13 ed.), Sects. 1261–2, and the cases cited.

Day *vs.* Roth, 18 N. Y., 448.

When he learned that Mr. Brainard had taken title in his own name, Mr. Buck had a right to claim the property; or, refusing it, to sue to recover his money; or to enforce his equitable lien against the property for the amount of his money which had gone into it.

III.

**The appellants are estopped from claiming that the title to the property did not pass under Mr. Brainard's will to Mrs. Brainard and under the deed from her to Mr. Buck.**

Whether Mr. Brainard did or did not know that his will would not pass title to after-acquired real estate is immaterial. He stated to Mr. Buck, for the purpose of inducing him to allow the situation to remain as it was, that the property would go to his wife. Mr. Buck believed this statement, and, induced thereby, took no steps to enforce or preserve his rights until after Mr. Brainard's death. All the elements of an estoppel exist.

It is not necessary to an equitable estoppel that there should be a design to mislead.

Mfrs. Bank *vs.* Hazard, 30 N. Y., 226.

Blair *vs.* Wait, 69 N. Y., 113.

A party need not have acted affirmatively upon a declaration, to claim an estoppel, if he has been led thereby to refrain from using means to retrieve his position.

Continental Nat. Bk. *vs.* Nat. Bk., 50 N. Y., 575.
Voorhis *vs.* Olmstead, 66 N. Y., 113.

IV.

**The appellees have not been guilty of laches.**

Having an equitable title and believing that he had a legal title, Mr. Buck remained in undisturbed possession of the property for more than fifteen years, from March 31, 1882, when he took the conveyance from Mrs. Brainard, until July, 1897, when the appellant William H. Brainard brought his action of ejectment.

An owner of an equitable title in possession is not obliged to take steps to establish his title until his possession is disturbed or his title attacked.

18 Am. and Eng. Ency. of Law, 2d ed., Title, Laches, Subdiv. VII, 7, p. 125, and cases cited.
Townsend *vs.* Vanderwerker, 160 U. S., 176, 185, 186.
Ruckman *vs.* Corey, 129 U. S., 387, 389.

Moreover, Mr. Buck, a non-resident, is not chargeable with notice of the law of the District of Columbia now obsolete, that a will did not then pass after acquired realty.

Stedman *vs.* Davis, 93 N. Y., 32.

V.

**The original and the amended bills were neither repugnant nor contradictory. And if the amended bill is defective in any point, it should be amended in furtherance of justice to conform to the facts proved.**

(*a*) Paragraph 8 of the original bill stated fully and truly, as Mr. Buck understood them, the motives that influenced Mr. Brainard to take title in his own name; it also stated the reasons which led Mr. Buck to propose the pur-

chase of the house together and to consent that his money should be used for that purpose. Paragraph 9 of the amended bill contains matter which Mr. Buck desired to omit if possible when he brought this action, *i. e.* the facts constituting the constructive fraud on the part of his brother-in-law. Every statement in both bills is strictly true and all the statements are consistent with each other.

(*b*) The statement in paragraph 8 of the original bill, that Mr. Charles F. Brainard understood and believed that the property would pass under his will to his wife, was inadvertently omitted by counsel in drawing the amended bill. Proof of this fact, however, was admitted upon the hearing without objection on the part of appellants' counsel. Hence, if this allegation was necessary in the amended bill, an amendment inserting it should be allowed in furtherance of justice.

1 Barb. Chan. Pr. (2 rev. ed,), p. 217, and cases cited.

Jones *vs.* Van Doren, 130 U. S., 684, 690.

(*c*) Appellants' counsel has seemed to lose sight of the main point in the case, which is, that though Mr. Buck suggested the purchase of the property and consented to the use of his money to provide a home for his sister, he did not consent that the title should be taken in Mr. Brainard's name; that this act was without Mr. Buck's knowledge, consent or authority; and that, when it came to Mr. Buck's knowledge, Mr. Buck was induced by Mr. Brainard's statement, that the property would pass to Mrs. Brainard under the will, to sleep on his rights and allow matters to rest *in statu quo* until after Mr. Brainard's death and until the action in ejectment was brought, when reparation was impossible.

## VI.

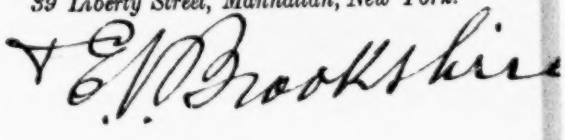
The decree appealed from was just and equitable and should be affirmed with costs.

No reversible error was committed upon the hearing. It has been established beyond question that Mr. Buck's money paid for the property; that Mr. Charles F. Brainard be-

lieved that he held title as trustee for Mr. Buck and was very careful to leave written evidence of this fact, in order that Mr. Buck's rights should be protected; and that Mr. Charles F. Brainard and therefore his heirs were estopped from claiming title by his statement, made to and acted upon by Mr. Buck, that the property would pass under the will to Mrs. Brainard, through whom Mr. Buck claims.

Respectfully submitted,

NELSON L. ROBINSON,
*Of Counsel for Appellees,*
*39 Liberty Street, Manhattan, New York.*



# Supreme Court of the United States.

No. 110.—October Term, 1901.

William H. Brainard, Edward Albert Brainard and Eva Hanmore, Appellants, *vs.* Leffert L. Buck and James Coleman. } Appeal from the Court of Appeals of the District of Columbia.

[February 24, 1902.]

The above appellants seek a review in this court of the judgment of the Court of Appeals of the District of Columbia, in this case, affirming a judgment of the Supreme Court of the District enjoining the appellants from the further prosecution of an action of ejectment brought by them against appellee Coleman in the Supreme Court of the District, to recover a one-fifth interest in a house and lot in the city of Washington, in the possession of Coleman as tenant of appellee, Leffert L. Buck, who claims to be the owner thereof. The appellees, Buck and Coleman, commenced this suit in April, 1898, and in their bill of complaint they alleged the bringing of the action of ejectment on or about July 26, 1897, by William H. Brainard, as one of the heirs of his brother, the late Charles F. Brainard, to recover an undivided one-fifth interest in the real estate mentioned. The bill further alleged that the complainant Buck was the brother of one Cornelia A. Brainard, whose husband was Charles F. Brainard, both of whom lived in the city of Washington up to the time of the death of Charles on May 13, 1881, and the widow thereafter continued to live in that city until her death on March 31, 1892. On June 12, 1872, Charles F. Brainard, the husband, made and executed his last will and testament, by which he devised and bequeathed to his wife all of his property of every kind and description for her own use and benefit. Afterwards and on July 18, 1879, there was conveyed to Charles F. Brainard by deed the premises in question. After the death of Charles F. Brainard and on March 31, 1882, his widow, by deed, duly conveyed her title to the premises to her brother, the complainant Buck. The bill then contained the following averments:

"8. The plaintiffs further show that the plaintiff, Leffert L. Buck, was the brother of the said Cornelia A. Brainard, and that her husband, the said Charles F. Brainard, was in his lifetime employed as a clerk in the Treasury Department; that he had little or no means of support outside of the salary which he received, and that the plaintiff, Leffert L. Buck, being willing to aid and assist his sister, and being solicited by her

and her husband so to do, furnished and advanced the money to pay for the said property and premises first above described; that the said premises were purchased with money so advanced by the said plaintiff, L. L. Buck, in part directly to the said Brainard to pay for and on account of said property, and in part to the wife of the said Brainard, and in part in taking up and paying encumbrances which had been put upon said property for the purchase price thereof; that said money was so advanced and said property purchased for the sole and only purpose of giving to the said Cornelia A. Brainard, the sister of the said L. L. Buck, a home, and that it was so understood by the said Brainard at the time of said purchase; that the said property was conveyed to the said Brainard instead of to his wife for the reason that prior to said conveyance the said Brainard had executed his will, by which said will he had devised and bequeathed to his said wife all of his property of every kind, and it was understood and believed by the said Brainard and his wife that if she should survive him the property would descend to her, and that in event she should not survive him, her said husband, she would have a home on said property during her lifetime, and that during said period said Brainard should hold the title to said property as trustee for said plaintiff, Leffert L. Buck."

The bill then set forth the names of the surviving heirs at law of Charles F. Brainard, and averred that some of them had quitclaimed the property to the plaintiff Buck. It is also averred that from the time of the death of Charles F. Brainard his widow lived in the house, and that she conveyed the premises to Buck by deed on March 31, 1882, and that he believed that the legal title was in him until the commencement of the ejectment suit, when he was advised that the will of Charles F. Brainard did not convey the property to his sister for the reason that it was acquired by Brainard after the execution of the will, which did not operate to convey after-acquired property.

For relief, the bill asked that the plaintiffs in the action of ejectment might be perpetually enjoined from further prosecuting the same, and that it might be declared that the land in question was charged with a trust in favor of, and ought to be held for, the use and benefit of the plaintiff Buck, and that the defendants, or such of them as should appear to have the legal title to the lands, should be decreed to convey such legal title free and clear of all encumbrances done or suffered by them or any or either of them unto the plaintiff Buck.

The defendant William H. Brainard demurred to the bill on the ground, among others, that the promise set forth in the bill was not in writing or signed by the deceased, Charles F. Brainard, and was within the meaning of the statute for the prevention of frauds and perjuries; also that Buck had been guilty of gross and inexcusable laches in bringing his suit.

The demurrer was sustained with leave to the plaintiffs to amend. Pursuant to such leave the plaintiff served an amended bill, which was a

full and complete bill, taking the place of the original, and restated all the facts set forth in the original bill, but left out the above quoted eighth paragraph. The complainants in the ninth, tenth, eleventh and twelfth paragraphs of the amended bill made the following averments:

"9. That from March 12, 1875, until June 3, 1880, the said plaintiff, Leffert L. Buck, sent to the said Charles F. Brainard, for investment as agent for him, the said Leffert L. Buck, various sums of money—the particular amounts of which, and the dates at which they were received by said Charles F. Brainard, deceased, are stated in 'Exhibit D,' hereto annexed—and authorized the said Charles F. Brainard, as agent for him, the said Leffert L. Buck, to invest the same in real estate, bonds and securities in the city of Washington; that on or about the 18th day of July, 1879 the said Charles F. Brainard purchased the said property and premises hereinbefore described for the sum of $6,350, and paid on said purchase price the sum of $2,550 out of the moneys so sent to him for investment by the said plaintiff, Leffert L. Buck, as aforesaid; that upon said purchase the said Charles F. Brainard took the deed of said property to himself without the knowledge, consent or authority of said plaintiff so to do; that said deed is the same deed hereinbefore mentioned as 'Exhibit B;' that thereafter and on or about March 12, 1880, said Charles F. Brainard made a further payment of $1,266.66 on said property out of said moneys so sent to him for invesment by said plaintiff, Leffert L. Buck, as aforesaid; that on the 8th day of June, 1880, there still remained in the hands of said Charles F. Brainard out of the said moneys so received by him for investment as agent for the said plaintiff, Leffert L. Buck, the sum of $793.58, no part of which has ever been repaid to or received by said plaintiff; that on or about the 25th day of July, 1879, said Charles F. Brainard executed to John F. Waggaman and James A. Harban, trustees, a deed of trust on said property to secure payment of the balance of the purchase money then unpaid thereon, and that said deed of trust was executed without the knowledge, consent or authority of said plaintiff, Leffert L. Buck; that after the 8th day of June, 1880, and before his death, the said Charles F. Brainard made further payments on said property, not exceeding in amount the sum of $650, out of the said moneys so received by him from said plaintiff for investment as aforesaid, the particular dates of which payments plaintiffs are unable more definitely at this time to state, for the reason that the books and accounts of the Western Building Association, to which said payments were made, have been destroyed.

"10. That after the death of the said Charles Brainard the plaintiff Leffert L. Buck was informed by his said sister, Cornelia A. Brainard, that she held the legal title to said property under the last will and testament of her said husband, which is the instrument hereinbefore mentioned as 'Exhibit A,' and that there remained unpaid upon said trust deed the sum of $1,971.81; that thereupon, and on or about the 17th day of March, 1882, said plaintiff, Leffert L. Buck, paid the balance due upon said trust deed, which was thereupon discharged, to wit, the sum $1,971.81; and thereafter, and on the 31st day of March, 1882, the said Cornelia A. Brainard conveyed the said property to him by the deed referred to as 'Exhibit C,' and the said plaintiff, Leffert L. Buck, thereupon and on

that day entered into and has ever since remained in undisturbed possession of said premises.

"11. And the plaintiffs further show that all of the moneys that were paid for the purchase of said property, including the whole consideration thereof, were paid by the plaintiff Leffert L. Buck.

"12. And the plaintiffs further show that not until after the said action at law No. 41,274, which is the suit of said William H. Brainard against James Coleman, had been brought had the plaintiff Leffert L. Buck any information that the legal title to said premises did not pass to his sister, the said Cornelia A. Brainard, under the will of her said husband, Charles F. Brainard."

The defendants demurred to this amended bill on the same grounds stated in the demurrer to the original bill, and also on the ground that a new and different cause of action had been set up in the amended bill from the one in the original bill. The demurrer was overruled, and the defendants thereupon answered, in which among other things, they denied complainants' allegation as to the payments for the premises by Buck, and averred that the purchase money for the premises had been paid out of Charles F. Brainard's own funds in cash or by his notes secured by deed of trust, which notes were subsequently paid by Brainard.

Upon the trial there was a final decree in favor of the complainants, and the defendants were enjoined from prosecuting the action at law, and they were directed to convey, quitclaim and release the real estate unto the complainant Buck, and in default of their doing so it was adjudged that the decree then given should operate and stand as such conveyance, quitclaim and release.

Mr. Justice PECKHAM, after stating the above facts, delivered the opinion of the Court.

The appellants insist that the Supreme Court of the District had no power to authorize the amendment which was made by the appellees to their original bill in this suit, because, as they assert, the cause of action set forth in the amendment is new, different and distinct from that set forth in the original bill, and that therefore the demurrer to the amended bill should have been sustained.

We fully agree with the courts below in holding that the allowance of the amendment was within the discretion of the court, and that the demurrer on the ground stated was properly overruled. The case comes within the principle of *Jones* v. *Van Doren*, (130 U. S. 684, 690.) The purpose in both bills was the same, to establish a resulting trust in favor of the complainant Buck on account of the transactions set forth in the bills, and while the reasons are stated more fully in the amended bill and in some respects differently from those in the original bill, yet the purpose

is the same, arising from the same transactions and based upon the same general rule of law applicable to resulting trusts.

Upon the merits of the case, the two courts below have come to the same conclusion. The general finding of the trial court in favor of the complainants was a finding in their favor of all the material facts alleged in the amended bill, and those facts have been repeated and affirmed in the Court of Appeals, and we are now asked to review and reverse those findings upon the testimony contained in the record. It ought not to be done in this case. It is the settled doctrine of this court that the concurrent decisions of two courts upon a question of fact will be followed, unless shown to be clearly erroneous. (*The Carib Prince*, 170 U. S. 655, 658, and cases there cited.) After examining the evidence in the case, we are not convinced that the findings of the court below were erroneous, but on the contrary it seems to us that they are justified by the evidence.

In regard to the evidence on the part of the complainants given on the trial, defendants assert it to be different from and inconsistent with the statements of fact contained in the amended bill, but a careful perusal of the whole evidence fails to convince us that there exists any such real and material inconsistency, but on the contrary the evidence substantially corroborates and justifies the averments of the amended bill.

The account book of the deceased Brainard was put in evidence, and some criticism has been made by counsel for the defendants in regard to the manner in which the deceased kept his accounts, as evidenced in that book, and some faint claim seems to have been made that the book showed that moneys had been sent by Brainard to Buck instead of the reverse, as claimed by Buck. This criticism arises on account of the position of the words "Dr." and "Cr." with regard to the statement of the account between the two people. However, a perusal of the accounts in the book, taken in connection with the statement of the account between the parties made by Brainard in his lifetime and in his handwriting and given to complainant Buck, shows beyond any controversy that the moneys were advanced by Buck to Brainard and not the reverse. There is really no contradiction of the evidence on the part of the complainants that it was the money of Buck, and his alone, which paid for the property in question.

From the evidence which was taken upon the trial and upon which the trial court gave judgment in favor of the complainants, the Court of Appeals itself found the facts similar to the averments in the amended bill, and stated them as follows:

"Leffert L. Buck was a civil engineer and a bachelor. His residence was in the city of New York; but his professional engagements called him to different parts of the world. He testified that he went to Peru in 1875, and before leaving sent about $200 to Brainard for investment. He

continued to send sums of money from time to time from 1877 to 1880, and during the latter year. Brainard invested from time to time in bonds which he sold for reinvestment.

"Brainard kept an account book, which has been preserved, and the entries therein of money received from Buck correspond with a statement rendered to the latter and produced by him in evidence.

"Buck testified that he suggested the joint purchase of the house and lot in controversy, which Brainard wrote him could be had for $6,350. Brainard made the purchase at that price on July 18, 1879, making a cash payment thereon of $2,550 with Buck's money, as the account book shows. The remainder was raised by mortgage. The account book, under the same date, shows the charge of the cost of recording the deed, and of insurance against Buck. The deed was made to Brainard.

"Buck testified that early in 1880, he learned that the deed was in the name of Brainard alone, and suggested to the latter to convey to him and he would pay the balance, and Brainard and wife could occupy the house as a home. Brainard was then in bad health. He did not wish to make the transfer then, saying that when he recovered he would be able to go on and pay the balance on the property, and would also be able to pay for Buck's half, and he thought that better than to go to the expense of making two transfers. He said that, in any event, the property would go to his wife with everything that he had in case of his death. He was sick and nervous, and Buck did not press the matter. Brainard died of Bright's disease, and was suffering therefrom at the time, though it was not then known.

"On March 12, 1880, he paid $1,266.66 on the mortgage with Buck's money in his hands.

"Some time after that Brainard made a statement in writing of the cost of the property, showing the payments made with Buck's money, and stating therein that he proposed to convey to Buck a half interest in the property, and to give him his note for the excess paid over one-half. He expected to be able to pay back to Buck this excess and also to finish paying for the property.

"Buck testified that he did not agree to this, but let matters run on because of Brainard's nervous condition, and because he expected the will of Brainard would vest the legal title in his sister. Brainard died without completing the payment for the property.

"Mrs. Brainard remained in possession, claiming under the will, but conveyed the title to Buck, who paid the last mortgage, amounting to nearly $2,000. Mrs. Brainard made her home there until she died on March 31, 1892. Buck was frequently there, and contributed to her support. When she died he leased the property and has since collected the rents, kept the property in repair, and paid all the taxes.

"Without going into further details, it is sufficient to say that the evidence on behalf of Buck, corroborated on all the material points by the entries in the book of Brainard, shows clearly that the purchase of the property was made with his money in the hands of Brainard for investment; and that Brainard was his agent and trustee and not his debtor for money lent for the purpose. From these facts it is clear that a trust resulted in favor of Buck, which entitled him to a conveyance of the legal title. (2 Pom. Eq. sec. 1037.)"

We think the law in this respect was correctly stated by the court below.

The defendants also rely upon the defense of laches on the part of the complainants, in that they permitted so long a time to elapse after they knew that the title was in the name of Brainard.

We also agree with the court below that this defense is not sustained. When the knowledge came to the complainant Buck that the title was in Brainard, Buck asked him to transfer it to the complainant, and stated that he (Buck) would pay the balance of the purchase money unpaid on the premises. This Brainard disliked to do, and wanted Buck to wait and see if he (Brainard) could not make payments, and thus keep the house for himself. During this time Brainard was ill, and, as it subsequently appeared, was then suffering from Bright's disease, although he did not then know the cause of his illness, and the complainant says that he acquiesced because he did not wish to worry Brainard, and so the matter ran on for a little while, and was terminated by the sudden death of Brainard without anything having been done.

This did not amount to any settlement, nor did it in any way bar the rights otherwise existing in favor of the complainant Buck. It was a mere hope expressed on the part of Brainard that he might thereafter be able to pay for the house and a passive acquiescence on the part of the complainant that such effort might be made. As is said, nothing was ever in fact done, and no real alteration was ever made in the position of the two parties.

We have then the conditions of the title taken to the property in the name of Brainard, unknown to the complainant at the time, and the money furnished by Buck to Brainard as his agent, and put into the purchase of the house and lot. Subsequently and a short time before the death of Brainard, Buck discovers the fact, and Brainard and his wife are then living on the premises. He knows that Brainard has made a will in favor of his wife, for he has been told by Brainard that upon his death everything was to go to her, and wants his sister to have a home, and is entirely satisfied in that way. He believed that the property would pass to the wife by the will in case of the death of Brainard. After Brainard's death, his widow (complainant's sister) remains in the house, and Buck contributes to her support while living there. She conveys the premises to him by deed, and he supposed that he thereby acquired full title to the premises, and paid the balance of the purchase money. After the death of his sister he takes possession of the property, and has continued in possession ever since, and it was not until after the commencement of the action of ejectment that the complainant Buck had any knowledge that the legal title to the premises did not pass to his sister under the will of her husband, because it was acquired subsequently to that will. That action of

ejectment was commenced in 1897, and this bill was filed April 15, 1898. These facts, we think, are sufficient to excuse all the delay that has been shown to exist in this case. It is covered by the principles laid down in *Ruckman* v. *Cory*, (129 U. S. 387, 389,) and *Townsend* v. *Vanderwerker*, (160 U. S. 171, 185, 186.)

Upon this subject we fully agree with what was said by Mr. Justice Shepard, in delivering the opinion in this case in the Court of Appeals, as follows:

"Buck entertained affection for and had perfect confidence in Brainard. He was anxious to secure a comfortable home for his sister. Brainard became seriously ill, and his condition was such that Buck would not aggravate it by importunity. Besides, he was assured that Brainard would devise the property to his sister. In fact, Brainard had made, and executed with due formality, a will leaving everything to his wife. This will was then, and until the institution of the action of ejectment, supposed to operate a conveyance of the property in question. Buck, so believing, took a conveyance from his sister, who was childless, and paid off the last encumbrance. He suffered her to occupy the house until her death. In the meantime, none of the heirs-at-law of Brainard made any claim to the property. Their apparant acquiescence tended to confirm Buck, who was in actual possession all of the time, in the belief that his title was perfect. There was nothing, therefore, to suggest the necessity or importance of resorting to a court of equity for the confirmation of that title, until the institution of the action of ejectment. When roused to action, he was diligent in taking it. This long, undisturbed possession, under a title supposed to be perfect, presents a stronger excuse for delay, also, than that held sufficient in *Ruckman* v. *Cory*, *supra*, wherein it was said: 'Nor has the plaintiff been guilty of any such laches as would close the doors of a court of equity against him. He was in the peaceful occupancy of the premises for some years prior to any assertion of title upon the part of the defendant under the deed of 1872. If he had not been all the time in the possession of the premises, controlling them as if he were the absolute owner, the question of laches might be a more serious one than it is. The bringing of the action of ejectment was, so far as the record shows, the first notice he had of the necessity of legal proceedings for his protection against the legal title held by the defendant. As proceedings to that end were not unreasonably delayed, we do not perceive that laches can be imputed to him. Laches are rather to be imputed to the defendant, who, although claiming to have been the absolute owner of the lands since 1862, took no action against the plaintiff until the ejectment suit was instituted.'"

The last objection made by the appellants consists in an assertion that in no possible view of the evidence, even upon a proper bill, could Buck be properly held to be entitled as a matter of equitable right to more than a decree for an accounting, wherein he should be credited with advances of money made by him to Brainard in the latter's lifetime and invested by the latter in the property, and further credited with the sum paid by him after Brainard's death in the settlement of Brainard's debt to the

building association secured by the deed of trust, (thus subrogating him to the rights of the association,) and charged with rents and other proper offsets and with an equitable lien on the property for the balance thus found to be due, if any.

Taking the facts as found by the courts below, this claim is not well founded. The moneys of the complainant Buck were used by his agent Brainard in the purchase of the premises and at the time of the death of the agent the whole purchase price had not been paid. After his death that balance was paid by Buck, who thus paid every dollar that has gone into the purchase price of the premises, and the substance of the whole evidence tends directly to show that while the funds were used by the agent with the assent of his principal, Buck, the taking of the title in Brainard's name was unknown to his principal. Buck's money, and Buck's money alone, has been paid for the whole premises, and there is neither equity nor justice in refusing him the legal title to the property purchased with his own money.

The judgment should be

*Affirmed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*

END OF CASE